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FIFTY YEARS

OF THE

ENGLISH CONSTITUTION

1830–1880

BY

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TO

MY SON AND DAUGHTER.

'For Freedom's battle once begun,
Bequeathed by . . . . sire to son,
Though baffled oft, is ever won.'

'Whence did this happy organisation first come? Was it a tree transplanted from Paradise, with all its branches in full fruitage? Or was it sowed in sunshine? Was it in vernal breezes and gentle rains that it fixed its roots, and grew and strengthened? Let history answer these questions. With blood was it planted; it was rocked in tempests; the goat, the ass, and the stag gnawed it; the wild boar has whetted his tusks on its bark. The deep scars are still extant on its trunk, and the path of the lightning may be traced among its higher branches. And even after its full growth, in the season of its strength, when its height reached to heaven, and the sight thereof to all the earth, the whirlwind has more than once forced its stately top to touch the ground; it has been bent like a bow, and sprang back like a shaft. Mightier powers were at work than expediency ever yet called up; yea, mightier than the mere understanding can comprehend.'

Coleridge's *Lay Sermons.*

PREFACE.

On the foundation of University College, London, my Father, the first Professor of English Law, had a class of law students the formation of which, on many grounds, constitutes one of the most memorable incidents in the history of the College. The class numbered from one hundred to two hundred students, and included the most promising among the aspirants in both branches of the legal profession, and many whose later career in the political world, as well as at the Bar and on the Bench, has fully confirmed their early promise. The experiment of giving Law Lectures to a promiscuous class of students not necessarily intending to pursue a professional life was unprecedented; and I have no hesitation in recalling the fact, that my Father's qualifications and success were almost equally unprecedented in the history of public teaching in this country. The Lectures were delivered continuously from the session of 1828–1829

to that of 1835–1836. Among the Lectures was a course on the English Constitution and Constitutional Law. These Lectures, which were published at the time, but have not yet been republished, brought the record of the Constitution, as it mirrored itself to my Father,—whose incomparable eminence as a constitutional lawyer has never been disputed,—down to the period just preceding that of the present reign. I have been happy enough to feel that I could comply with the suggestions of a filial loyalty, while discharging a useful public duty, in continuing the record of the movements of the Constitution down to the present day.

In the body of this work I have shown that the apparently fragmentary or partial character of my method of selecting a period is inherent in what I believe to be the only sound mode of treating of the Constitution at all. My Father's Lectures were delivered at the moment when the structure of Blackstone was still quivering under the assaults of Bentham. Later experience has shown that neither Blackstone, nor Bentham, nor even Austin and Mill, could, by any of their compact theories or legally circumscribed logic, compass the length, and breadth, and depth, and height of the Constitution they criticised or

affected to describe. The experience of the last fifty years has shown, perhaps more than that of any other period since Henry III. and Edward I., that the Constitution is no stiff and formal mechanism, but a natural and necessary product of all the latent forces of the national life and character. In no period has political action been more restless and energetic, and legislation progressed more rapidly and courageously. Nevertheless, the great and deeply-graven lineaments which mark out the English Constitution from every other are as distinct as they were at the accession of William IV. If they have altered or widened, they have done so only by keeping pace with the steady and widening impulses of the advancing national temperament, in obedience to the call of a civilisation which may properly be termed new.

It is thus no longer to lawyers and law-books alone that reference must be had for ascertaining what is the mode of government under which the English people live. Far rather is it to the utterances of statesmen, to critical acts of public policy, to the conduct of Parliamentary majorities, and to the assumptions of the Executive Government. The review is thus becoming far more political than legal, and still more ethical than either. Thus this treatise

is dedicated as much to establishing a new method, as to bringing to light a train of special facts to which the method is applied.

SHELDON AMOS.

9 KING'S BENCH WALK,
TEMPLE

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FIFTY YEARS OF THE CONSTITUTION.

CHAPTER I.

THE CONSTITUTION AND ITS MOVEMENTS.

WHAT is familiarly known as the English Constitution possesses so many unstable as well as stable elements that a purely historical method of inquiry has naturally commended itself as the most hopeful mode of studying that Constitution and of predicting its probable movements in the immediate future. Mr. Hallam and Professor Stubbs have had the advantage of extending their historical researches over a very considerable period, reaching, in Mr. Hallam's case, to the end of the reign of George II. Sir T. Erskine May has purported to bring Mr. Hallam's work down to the present day; and Mr. Walter Bagehot has drawn a vivid and severely exact portraiture of the working of the Constitution at the time his treatise appeared. Most of these works treat of times very ancient or very recent, and for this reason scarcely suffice to determine the true directions in which the English Constitution may be said to be moving at the present moment, and therefore

fail to describe that Constitution as it really is. If Sir T. Erskine May's work seems to cover the ground here alleged to be vacant, there are other objections to that work which largely reduce its value and render it of little service for the purpose of really testing the existing state of the Constitution. The work is wholly uncritical in its character and conception; it makes little selection of materials, not distinguishing what is of merely transitory and what is of lasting import; and it concerns itself more with defending modern political changes, so far as they seem to follow in the wake of a Whig theory of government, than with scrutinising the real bearing of these changes on the progress of the Constitution.

The period of fifty years intervening between the year 1830 and the year 1880 seems to present limits peculiarly suited for marking out both the essential and unchangeable elements of the Constitution—if there be any such—and also the growing and variable elements on the movements of which the future of the Constitution depends. Within these limits of time, it is necessary, in view of the purpose indicated, only to recur to those events or constitutional epochs which are of critical moment. A summary of, or even allusion to, all political facts indiscriminately would convert a constitutional analysis into a mere political history. The investigation is not concerned with the general value of legislative enactments, or the success or ill-success of Executive Governments, but with the structure of the English Government itself, and the progressive modifications, in one direction or another, which are taking place in that structure. The only questions for the constitutional inquirer are, where is the supreme

authority ultimately situated, and what practical guarantees are provided for the individual citizen against abuses of that authority. Under these general heads are, in truth, gathered up all the multiform inquiries with which a scrutiny of the constitutional condition of a modern State teems. These inquiries relate to a number of somewhat complex topics which often seem little connected with one another. Such topics are the amount, kind, and formalities of popular representation in Parliament; the control exercised by Parliament over the Executive Authority, and the mode in which that Authority is created and sustained; the relations of local to central authorities, and of Dependencies to the parent State; and, not least of all, the constitution of Courts of Justice, the nature and administration of the Criminal Law, and the degree of arbitrary authority conceded to the permanent officers who are entrusted with the preservation of the peace.

It is not an unduly patriotic vaunt to assert that, as compared with the existing constitution of all other European States, the English Constitution best secures the primary object of all good government; that is, a wide diffusion of political rights coupled with effective guarantees for personal liberty. This is no optimistic view of the English Constitution; and the truth of it is testified not only by the treatises of accomplished foreign writers on the subject—who are commonly far deeper students of English institutions than English labourers in the same field—but by the fact that every constitutional movement in other European countries is attended either by an avowed copy of some characteristic English institution or by a tentative modification of one. Thus the movements or struggles of the

English Constitution at home are lifted into a region of more than merely national importance. Should the English Constitution be found, under the new conditions of European society, to fail at any important point, and to be insufficient for its ends, this must be a matter of moment to every country in the world. It is not easy to say what type of government can be proposed for the imitation of nascent or revolutionised States, if the English Constitution signally breaks down in the eyes of all men.

It has to be observed, however, that the imitation of English institutions here alluded to is at the best but partial and superficial. Trial by jury, a Second Chamber, the control of the public purse by the popular representative Assembly, the existence of some species of Cabinet, and even (if these exist anywhere out of English dominions and the United States) such securities as those afforded by the Habeas Corpus Acts, are only an insignificant portion of the fully-developed English Constitution. Those outward signs are, indeed, all that admit of being directly imitated and applied to other countries and conditions of society. But the true political constitution of any country must be, in a very large measure, the product of the peculiar social conditions and historical antecedents of that country. It is thus that it is unsafe for a foreign statesman to transplant any English institution into his own political system without studying that institution in action during a sufficiently long space of time, observing how far its success depends on the temperament of the people or on the character of statesmen, and ascertaining whether its apparent merits depend on its intrinsic value by itself, or on the presence of accompanying

institutions not easily or properly transferable from one country to another.

These remarks suffice to indicate the real complexity of the problem with which an inquiry into the true nature of a political constitution has to deal. The subjects of investigation are not only, nor mainly, lasting political institutions patent to the eyes of all men, and admitting of being accurately described and circumscribed, nor even legislative enactments clearly written and publicly acknowledged; but rather they concern the current practical interpretation which happens at a given time to be placed on ancient or modern institutions and laws, and the finer modifications of these institutions and laws, which in fact, though not, perhaps, in appearance, impart to them their real constitutional influence. In this way the personal character of a sovereign during a long reign, the dominance of a special school of statesmen, and even the more ephemeral tastes and prejudices of the bulk of the population, may alter the character and efficacy of institutions otherwise the most clearly marked in their general spirit and tendency.

Thus there are many sources from which a political constitution may and must be known, besides the more familiar ones of clearly-ascertained laws and institutions. The utterances of eminent and responsible statesmen, either not contradicted, or contradicted only to prevail more signally after debate: judicial interpretations formally placed on legislative documents of constitutional import: executive acts approved, or not finally condemned, by the Legislature: practices in derogation of written law and confessed constitutional principle, which, by being long habitual, have successfully occupied terri-

tory on which they originally encroached: and, finally, the less easily calculable and noticeable changes in public sentiment which, in proportion as they are fixed and durable, supersede all laws whether written or unwritten: these are all among the essential elements of every exhaustive constitutional inquiry. This is a further reason for making such an inquiry extend over some length of time not quite inconsiderable.

These observations lead to a remark closely akin to them. In every political constitution there are to be found side by side, and almost inextricably intermingled, both legal and what may be called 'moral' elements. It is in the discrimination of these elements, and the appreciation of the exact relation subsisting between them, that the main difficulty of the inquiry consists. The moral elements, which are constituted out of the current or past sentiments and personal proclivities of the people, of individual statesmen, of corporate legislative bodies, of kings, queens, and executive officials generally —while they undoubtedly tend to alter, or even to build up the structure of the Constitution—are as fugitive and difficult to grasp as they can well be. Nevertheless, such sentiments are far other than the mere casual freaks or caprices of the hour, which may chance to determine, under any Constitution whatever, whether the actual Government of the day shall be good or bad, honest or dishonest, selfish or (in the widest sense) patriotic and humane. The sentiments which mould the framework of the Constitution must possess a stability and duration which tend to impress upon those who share them a permanent type which is called 'character.' They change, no doubt, in the course of time, and sometimes with startling sudden-

ness; but the change is seldom fickle and unaccountable, and can usually be assigned to known and definite causes. It is not too much to say that the possibility of existence for any lasting political constitution, and certainly for one of the highest order, depends mainly on the capacity of the people, and of their actual governors, for entertaining throughout a sufficiently long space of time definite, rational, comprehensive, and stable political and moral sentiments in respect of the structure, working, and general aims of the Constitution. France and the United States are two examples close at hand, and it is not necessary to apply them in detail. It is through the presence of such sentiments hitherto in England that the abstract theory of the English Constitution has not led to practical anomalies of a most perplexing kind. It is through their existence that the English Cabinet has gradually attained its cohesiveness and authority; that a deadlock of divergent opinion between the two Houses of Parliament is of the rarest occurrence and the briefest duration; that a *veto* on the part of the Crown is practically obsolete; that the self-assumed privileges of the two Houses of Parliament have been supported even against the express decision of the highest Courts of Justice; and that the respective functions of the several Houses are progressively marked out by friendly agreement, without unseemly rivalry on the one hand or treachery to the public welfare on the other.

It is plain, then, that if the outer lineaments of a political constitution be written down ever so clearly and fully—as in the case of the United States and of most of the countries which have recently followed the American and English Constitutions as joint models—

the great mass of matter which really determines the substance and working, if not the form, of the Constitution still remains unwritten and incapable of being written. A forgetfulness of this fact often leads to an undue confidence in written Constitutions, and an undue diffidence in those which are unwritten.

These remarks are not here introduced in order to discourage at the outset any attempts to fix rigidly, or even ascertain with moderate precision, the true nature and bearings at any moment of a given Constitution. Their purpose rather is, to point out the only modes in which the highest attainable accuracy can be reached; and, by determining at once what are the matters which are not susceptible of verbal circumscription, to make all the more manifest those matters which are. The true difficulty of course is in drawing the line between the two. But this difficulty is less than it might appear, and by use of a proper method can have its real magnitude considerably reduced. It must be remembered that all truly constitutional facts (institutions violently imposed by a foreign invader and not yet assimilated, as well as inchoate experimental legislation, being of course left out of account) owe their origin to one and the same source. This source is the latent character and possibilities of the mass of the people as a whole. Hence, the first and most durable expression of this character will be sought for in those institutions—however they have taken their rise—which for hundreds of years are never violated except for a moment; or in those conspicuous constitutional documents, the very name of which is popularly cherished as a precious birthright, and which, originating in hardly-effected compromises or arrangements between representative parties in the State, are not only

thenceforth unassailable in fact, but are treated as unassailable in every constitutional argument. The further expression of this popular character is to be found in those distinct legislative acts, proceeding from assemblies really or professedly representative, which purport to define the limits of some admitted constitutional usage, or apply such usages to the novel exigencies of an increasingly complicated state of society. The Reform Acts, the Acts for the prevention and easy detection of Bribery, and the Ballot Act, as well as all Acts for the amendment of Local and Municipal Government, are examples of this class. Less distinct, but quite as real, modifications of the Constitution proceeding from the same cause (that is, broad popular assent or desire) are to be found in progressive changes in the acknowledged limitations of the Royal Prerogative. This prerogative, which will be subjected to a closer analysis later on, has always defied circumscription by exact written language, though a comparison of the decisions of Courts of Justice might suffice to throw into a tolerably clear shape the nature and limits of that prerogative at any given moment, so far, and so far only, as disputed questions relating to the prerogative happen to have been matters of judicial controversy. When all these sources of the existing Constitution have been examined, and the results clearly tabulated, it will be found that there is an important residuum, which no reference to consecrated usage, judicial decisions, or written documents of any sort, public or private, can account for. Yet the existence of this so-called residuum is not only undoubted as a fact, but may be for the moment the most portentous and prolific of all facts. It is of little use to teach in every primer, and

to reiterate on every platform, that by the English Constitution no free man can be imprisoned or put in jeopardy of his life except by the legal judgment of his peers or by the law of the country to which he belongs, if the people are indolent enough to suspend, at the mere dictation, not to say suggestion, of the Executive, all the practical guarantees for this liberty, and to be indifferent to the non-existence of trial by jury anywhere except close at home, and even there to its indefinite restriction or mutilation. It is of little use to refer to the stern principles by which the English monarch and his advisers are controlled in the creation, maintenance, and management of a standing army, if the simplest plea of necessity alleged by the Executive without further explanation is accepted by the bulk of the people as a satisfactory justification of the most glaring violation of these principles.

Confining the retrospect, then, to the last fifty years, it is obvious that the more permanent and deeper sources of the English Constitution can hardly be matters of inquiry at all. The only variable topics which come to the surface in a period so limited, and which it is of the slightest permanent importance to investigate, are Acts of Parliament, judicial decisions, and the popular interpretation of acknowledged principles—including in the word 'popular' the most illustrious as well as the humblest elements of the national life. The materials for the inquiry are at once suggested by the nature and limits of the inquiry itself. The deliberately-expressed opinions of eminent statesmen belonging to all political parties, the casual manifestations of strong and decided public feeling, the comments of scientific writers of repute, and above all the reports of executive acts of all

sorts, and of their reception by the Legislature and the public, form the main reservoirs of the information here searched for.

This enumeration of the quarters to which attention must be directed leads on to another remark which will form a fitting close to this introductory chapter. Whether the English Constitution is looked at throughout the whole length of its duration—say, from the first combination of Norman and early English elements—or only through a period sufficiently long to give true and fruitful results, it must be regarded as an organic whole, and not as a mere aggregate of distinct institutions and laws. If any metaphorical language were to be adopted (which is a very dangerous experiment in the case of politics—a study crowning all other studies, and therefore eminently *sui generis*), the parts of the English Constitution might be said to be connected together physiologically rather than chemically, and least of all mechanically. This topic has already been hinted at before, in speaking of the perils to which foreign copyists are liable in imitating detached English institutions. Some English institutions, such as the Royal Prerogative, the Cabinet, and the functions of the Houses of the Legislature, are so intertwined with the radical structure of the national political life that isolation of them in treatment would seem impossible. Yet it will be found in fact that writers, even of considerable authority, have been accustomed to treat one and another even of the most central institutions as if they either stood alone or might be combined without loss or gain with any other institutions whatsoever. Throughout this treatise the objects of all government in relation to public liberty and national progress will

be held to present a natural unity, round which all other institutions, however minute, will naturally gather, and to which they will be both explicitly and implicitly referred.

But even this mode of describing the unity of the English Constitution conveys a very inadequate idea of the real facts. It is not only a misleading mode of treatment to isolate any of the elements, and it is not only erroneous even to conceive of their independent existence, but the separation of one element from another, whether for discussion or thought, (unless this be done in the most provisional way, and with a besetting anxiety to guard against the characteristic dangers of the process), hides entirely out of sight the main facts which are the subject of inquiry. It matters little, for instance, what is the constitution or history of the House of Commons, if the origin and authority of the Executive Government and the force of local institutions are unknown quantities. It is even of small importance whether there is a monarch, or how the monarch is selected, or what are his reputed prerogatives, if the real centre of legislation and the avenues for the popular control of that legislation are left undetermined. Thus it is not merely a figurative conception of Samuel Taylor Coleridge that in every Constitution there is a central and germinating Idea, which must be known and grasped if the Constitution is to be understood at all, and apart from the presence and recognition of which all the distinct parts of the Constitution are a rude and mechanical framework. Of course, the term 'idea' has suggestions derived from great systems of philosophy which may seem to remove the inquiry from the field of modern and practical politics;

and Coleridge is not a writer whose name would, in the apprehension of many, impart confidence in what purports to be a strict investigation of the most recent history. But so long as the inseparable oneness, or call it atomic indivisibility, of the English Constitution is thoroughly understood, it matters little by what imagery or metaphors the fact is represented or popularised.

According to the method of handling the whole subject to be here attempted, the grammatical necessity of treating one thing at a time must be deferred to, but the reader will not be in harmony with the writer, and will entirely misunderstand the general argument, if he fails to treat each portion of it as dependent for its value and truth on the value and truth of every other portion. The general scope of the argument will, in fact, only be appreciated when all the chapters are retrospectively regarded as a whole. The reader may take his choice as to the chapter he begins with, provided he bears in mind that the truth it professes to impart is substantial so far, and so far only, as is that set forth in all the remaining chapters.

CHAPTER II.

THE HOUSES OF PARLIAMENT.

SECTION I.—COMPOSITION AND MUTUAL RELATIONS OF THE HOUSES.

So far as the movements of the English Constitution are concerned, as distinguished from what may be called its permanent or statical elements, attention is naturally directed first to the two Houses of Parliament. The structural constituents of local government, as found in the Parish, the County, and even the Parliamentary substitutes for these found in the modern complication of Districts, form perhaps the most stable and characteristic portions of the Constitution; while the peculiar political and historical situation of the Monarch might seem to invite primary attention in virtue of its dignity. But while the apparent immobility of local institutions on the one hand, and of the monarchical office on the other, marks real though somewhat indefinite limits to the activity of the central Legislature, it is in the proceedings and self-determining action of that Legislature that organic changes in the Constitution, whether gradual or precipitate, must be looked for.

The question is at once raised, which, in discussing the Coronation Oath, Coleridge brought into such clear relief, and the increasing importance of which is disclosed

by recent constitutional discussions in this and other countries—whether within the limits of the Constitution there is any part which, like an impregnable fortress, defies the assault of Parliament itself. The alleged omnipotence of Parliament, which was so distasteful or impossible a notion to Coleridge, is in fact, according to the views explained at length in the previous chapter, almost a contradiction in terms. Admitting that there are both stable and variable elements in the Constitution, it is obvious that the moment Parliament lays its hand on what is stable—and here lie concealed the roots of its own existence—it commits an act of suicide. While, then, it must be confessed that in one sense Parliament can do anything, because it can pass a law which by the existing Constitution must be recognised in every Court of Justice in the land, still there is a moral, not to say a mechanical force behind Courts of Justice themselves, which, by a more or less rough, irregular, dilatory, and often hazardous process, may nullify the decisions of Courts of Justice, either overturning the Constitution itself, or marking out afresh the limits within which legislation shall be permissible. The real history of this process is often lost, either by being buried in the annals of a violent revolution, or, when extending over a considerable period, by escaping notice through the imperceptible gradation of the steps by which the popular criticism finally attains its end. There have been notable epochs in English, American, and French history, when a patient constitutional observer might have done much to quiet the alarm of his countrymen by overhearing amidst the earthquake and fire of revolution the natural voices of a healthy and teeming constitutional life. In the United States,

indeed, the ultimate judgment on the constitutional character of all legislative acts, which is reserved to the Supreme Court, is practically subject to a carefully organised method of appeal to the people; and this often leads Englishmen to suppose, by a process of comparison, that their own Constitution has a finality which is not subject to the uncertain decisions of a Court of Justice, and which is still less open to admit change at the bidding of the popular voice. The fact is, that the Constitution of the United States, as here indicated, only expresses an attempt to reduce to strict language and form that which is an essential characteristic of every political Constitution in every country. The Legislature supplies the first motive force; the Courts of Justice—more or less bound and tied by their own unswerving traditions and principles—register the acts proceeding from this exertion of force; the People, as an organic whole, and as acting deliberately over a sufficient period of time, either accept or reject the Parliamentary innovations.[1]

[1] In suggesting a comparison between the constitutional functions of any English Court of Justice and the Supreme Court of the United States, it may perhaps be needless to mention that the English Court, when pronouncing a constitutional decision based on the interpretation of an Act of Parliament, cannot travel out of the limits and language of the Act itself, except (1) to ascertain (in case of dispute) that what purports to be an Act was passed with all the recognised constitutional formalities; (2) in case of ambiguous language to give a preference to that reading which best gives effect to recognised constitutional maxims; and (3) to raise a presumption —only to be rebutted by the most express language, if at all—against any interpretation of an Act of Parliament which shall appear to contravene certain constitutional doctrines which have already been judicially limited and explained, e.g., 'The King can do no wrong,' 'No length of prescription avails against the rights of the Crown,' the prerogative of the Crown in respect to the pardon of criminals, and the like.

It is one of the main problems of modern politics to facilitate on the one hand, and to obstruct on the other, changes in the Constitution. M. de Tocqueville and other well-known writers have laboured to point out the ultimate inefficacy of all artificial barriers against the strong and steady torrent of the popular will. The various obstructions to this will which already exist in England, or which are ingeniously contrived from time to time, serve a most useful purpose, partly by ensuring delay, partly by handing on the existing framework of the Constitution to a time when general education shall be more widely diffused, and political experience increased. For the present purpose it is sufficient to enforce the principle that it is to the two Houses of Parliament that immediate reference must be made when changes in the Constitution are believed to be imminent, or are held to be desirable or the contrary; but that, on the other hand, Parliament is not omnipotent, and that if the Constitution is changed ever so little in any direction, it is the people themselves who, by their activity or neglect, have changed it. *Securus judicat orbis terrarum.*

How far, during the period now under discussion, Parliament has, with general public assent, been in fact overstepping the limits by which its alleged omnipotence was formerly restricted, will be necessarily brought to light as the general characteristics of recent legislation are passed under review. It will then be seen how far there are any limits to legislation at a given time; how far these limits are moveable; and by what process they are moved.

Assuming then that the primary source of the move-

ments of the Constitution throughout any definite period must be sought in the structure, relations, and action of the two Houses of Parliament, it is important to compare the condition of the Houses in these respects as it was some fifty years ago and as it is at present.

It was not, perhaps, till about the commencement of the present reign—that is, in 1837—that the true consequences of the Reform Act of 1832 began to be fully apprehended. Mr. Walter Bagehot, in the Introduction to the latest edition of his memorable treatise,[1] has pointed out what the aristocracy really lost by the abolition of nomination boroughs and the enfranchisement of populous towns. The central force of the Constitution in fact swayed over from the titled nobility,—who had become, by a series of social changes, paramount in both Houses,—not to the general body of the people, but to the lately-enriched middle-classes, who must thenceforth preponderate in the Lower House, and thereby carry with them, for reasons which Mr. Bagehot explains at length, the Upper House. It may here be said, parenthetically, that it would be a misleading mode of treatment to discourse (as is necessarily done in text-books) on either House apart. As in the earliest days of the English Constitution, so now, the two Assemblies are emphatically one House of Legislature. Fully to vindicate the fact of this unity and the mode of its expression has required, and may yet require, many a tentative struggle and experiment conducted by the Assemblies in their mutual relations. It is, of course, easy to ignore this progressive identification by speaking carelessly of the weakness and worthlessness of the one body and the tyrannical force of the other; or of the

[1] *English Constitution*, Introduction to 2nd Edition, pp. xxiv. xxv.

subserviency of one, or of its degeneration, or of its being an anachronism, or of its needing radical reconstruction, or of the adventitious force it may owe to the presence of members of the Cabinet, and yet of the impotency of any devices to arrest the absorption of one Assembly into the other. So long as the two Assemblies are regarded as wholly separate and rival, not to say hostile, all sorts of crude and unpractical schemes will be afloat to reform one or the other House in a way which will be found persistently blocked by the spirit of the Constitution.

The history of the period under review has exhibited a series of improvements in the constitution of each House, and, it may be said, in the relations of the Houses to each other. The modifications in the constitution of the House of Lords are not of considerable importance, though, so far as they go, they point in the direction of making that House a more effective portion of the Legislature, and not in that of crippling and weakening it. The House has, in both its aspects, as a judicial and a legislative body, passed through two critical epochs, in the former of which characters it has been strengthened, and in the latter of which it has been weakened only in appearance, through having the region of its activity more strictly determined. After much controversy and some inconsistent legislation, the Appellate Jurisdiction Act of 1876 entirely remodelled the House of Lords as a court of final judicial appeal. Without derogating from the privileges of all Peers, that Act provided that three Peers, specially selected on the ground of their presumed legal capacity, must necessarily be present at the trial of appeals. The three were to be selected out of a list including the

Lord Chancellor, Peers who had held 'high judicial 'office,' and two,—and, at a certain time thereafter, four, —'Lords of Appeal in Ordinary.' These Lords of Appeal in Ordinary were to be specially created Peers for the purpose, to rank as Barons, and to be entitled to a Writ of Summons to attend and to sit and vote in the House of Lords; but their 'dignity as Lords of Parliament was 'not to descend to their heirs.' This last part of the enactment had in principle been recommended by a Committee of the Lords, appointed in consequence of the disputed right of the Crown to grant a life peerage to Baron Parke in 1856. This Committee proposed that Her Majesty should be empowered by Statute 'to 'confer life peerages upon two persons who had served 'for five years as judges, and that they should sit with 'the Lord Chancellor as Judges of Appeal and Deputy-'Speakers.' A Bill founded on this recommendation was passed by the House of Lords, but after much discussion it was rejected by the House of Commons.[1]

This creation of Lords of Appeal who could sit and vote in the House as Peers for life was an innovation, not only in respect of the new dignity created, but of the method of the creation. It was indeed by Acts of Parliament that the representative Peers of Scotland and Ireland sat in the House, and it was by force of several Acts of Parliament that one and another spiritual Peer retained or lost his seat, and the Irish spiritual Peers were excluded in a body. Nevertheless, the composition of the House of Lords had always been held to depend either on the Royal Prerogative acting under strict limitations, or on the precedents, traditions, and inalienable rights belonging to the House itself or

[1] See the references to Hansard in May's *Const. Hist.* vol. i. p. 299.

to its members. Thus the creation by an Act of Parliament of Peers for life, capable of sitting and voting in the House, though primarily designated for special work, and limited at first to a number almost escaping observation, is, in fact, a decisive and recognised claim on the part of Parliament to remodel the whole composition of the House of Lords, with as much facility as the Legislature experiences when reforming the House of Commons. The reforms, both in the House of Commons and in the House of Lords, by which the present reign and the preceding one have been distinguished, point to a self-developing power in the Constitution, which up to 1832 had scarcely been suspected as existing except in time of revolution; and even at moments of the most self-conscious change—as when Parliament is engaged in altering or directing the succession to the Crown, in providing for a Regency, or, in desperate emergencies, in passing *ex post facto* laws, to fill an apparent vacuum in its own continuity—the most laboured efforts have been resorted to to maintain the outside form of identity and immortality in the Constitution, whilst the real process of change was disguised in a way often cumbrous and circuitous, if not puerile. It is not here the place for discussing what may be the political consequences of this decisive constitutional movement. A self-determining activity in respect of her political constitution has been disclosed in England later perhaps than in any equally civilised State; and the English House of Lords might naturally have been expected to be the last citadel which the necessity or appetite for change would reach. But that institution, by showing itself as plastic and modifiable as all parts of a living structure must be, has probably taken the

surest path to prolong its own existence, and recommend itself to popular favour.

The occasion on which the House of Lords might seem to have been weakened as an independent portion of the Legislature was the repeal of the Paper Duties in 1861. When the House of Lords decided to maintain a tax which the House of Commons had decided to have repealed, it joined issue, probably for the last time, on a question which hitherto had been less a matter of severe constitutional usage than of mutual courtesy between the Houses and of almost undisputed custom. It was imputed to the House of Lords that it thereby in effect initiated a Money Bill, counter to the fixed popular notion and habitual practice that all propositions for taxing the people should first be addressed to the popular representatives in the Commons by the Ministers of the Crown, the functions of the Upper House being limited to the simple acceptance or rejection of the proposed tax. When Mr. Gladstone, on May 6, 1861, announced that he intended to include all the chief financial propositions of the Budget in one Bill, he 'virtually placed the Lords,' as the Rev. W. M. Molesworth says in his History,[1] 'in the position of being obliged to 'accept or reject the whole financial scheme; and in fact 'deprived them not only of the power that they had 'exercised in the case of the paper duties, but of that 'power of examination and amendment of details which 'they had hitherto enjoyed without question or dispute.' The House divided on Mr. Gladstone's proposition, and his Bill was carried by a narrow majority of fifteen. The dispute between the Houses was not carried any

[1] *History of England* from the year 1830 to 1874, vol. iii. p. 181.

further. The victory was won in much the same way as the well-known constitutional victories of earlier times had been won by the two Houses as against the King. As in the older time the King could not obtain a supply without at least promising a redress of grievances,—the acknowledgment of the grievances and the validity of the grant being henceforth bound up in one indivisible whole,—so, by the mere form of the reference from the one House to the other, the Lords were rendered incapable of dissenting from the repeal of the Paper Duties without rendering themselves responsible for a standstill of government, consequent on their refusal to grant the Crown the revenues necessary for carrying it on. This device, by which the pressure of one part of the Legislature is brought to bear on the other, is obvious enough of its kind, but must be kept for use only on the rarest emergencies, at the risk of a deadlock occurring, and strong personal feelings concurring with the real demands of utility to relieve the situation in some other way than by the lasting subordination of that part on which pressure is brought to bear. A similar sort of pressure through the medium of Money Bills was brought to bear in France in 1877, when the President of the Republic persistently refused to co-operate, according to the recognised constitutional forms, with the other departments of the Legislature; and the same device is notoriously used with great frequency,—not to say abused,—in the English Colonies having Parliamentary institutions.

The existing practice by which the House of Lords liberates itself from the inconvenience of being unable to propose grants of money, or to include in its Bills measures involving grants of money, has been recently

criticised from a different point of view by so competent an authority as Mr. Gladstone. The practice is, for the House of Lords to insert in the Bills which it sends down to the Commons all the clauses involving expenditure, but to have them printed in italics, as mere suggestions on which the Commons are invited to found an original proposal. Mr. Gladstone [1] comments upon this practice as follows: 'In addition to the activity of 'private, professional, and local greed, and the possible 'cowardice of ministers in resistance, it must be noted 'that the House of Lords has done very great mischief 'in this respect, by voting into Bills the establishment 'of officers and appointment of salaries, and sending these 'Bills to the Commons with all such portions printed in 'italics, a conventional expedient adopted in order to 'show that they are not presented as parts of the Bill, 'but only as indications of the view or wish of the House 'of Lords; in matters, however, in which they have as a 'body no more right or title, than the House of Commons 'has or had to send in italics, or by any subterfuge, to 'the Lords a direction as to the judgments to be given 'in appeals. Here, then, we have a real case in which a 'power of the Crown has been greatly and mischievously 'weakened.' In the passage just preceding, Mr. Gladstone had said that the prerogative of the Crown in virtue of which it takes the initiative in proposing grants of public money had been of late years seriously and increasingly infringed, to the great detriment of the nation. 'Local claims, and the interests of classes 'and individuals, are now relentlessly and constantly 'pressed from private and irresponsible quarters; and

[1] 'Review of Life of the Prince Consort,' *Gleanings of Past Years*, vol. i. p. 81.

'though the House of Commons still maintains the rule 'that money shall not be voted except on the proposal 'of the Crown, yet it permits itself to be pledged by 'Addresses, Resolutions, and even the language of Bills 'and Acts, to outlay in many forms, and these pledges it 'becomes morally compulsory on Governments in their 'turn to redeem.' It might well be urged that through these irregularities, not only is one of the most antique usages of the Constitution practically rescinded, but all the evils of irresponsibility in respect of the general management of the public exchequer may be expected to follow. Another most competent critic of English Parliamentary institutions, Earl Grey,[1] also comments on some of the consequences of growing informalities in the mode by which the House of Commons asserts its claim in respect of granting supplies. 'A wholesome 'rule of Parliamentary law debars the House of Com- 'mons from making any grants of money without the 'previous recommendation of the Crown through its re- 'sponsible Servants; but unfortunately this rule may be 'evaded by addresses from the House to the Crown, 'praying that certain grants may be made, and promis- 'ing to provide for them. Such addresses have been too 'often moved of late years; and if the House of Com- 'mons should fall into the habit of thus virtually setting 'aside the wise principle of our Constitution, which 'makes the Ministers of the Crown responsible for 'originating all grants of money, a door will be opened 'to the very worst corruption.' If the view of these writers be correct, it is an instance in which one of the modern movements of the Constitution takes the form

[1] *Parliamentary Government considered with reference to Reform.* New Edition, 1864.

of an aggression on the part of the Lords' House on the prerogatives of the Crown; and, concomitantly with the other facts already noticed, as well as the recent abolition of proxies in 1868, it points on the whole to a general invigoration of the Upper House of Parliament.

A rhetorical and extreme but suggestive account of the actual preponderance of the House of Commons over all other departments of the Constitution, is contained in the following extract from a speech of Mr. Lowe, the late Chancellor of the Exchequer, delivered in the House of Commons, March 4, 1879.[1]

'As to the state of the Government, there are 'remarks to be made which are extremely important if 'hon. gentlemen would consider them. Most of us have 'been brought up in the doctrines of De Lolme and 'Blackstone. We have been told that the English 'Constitution is one above all that have existed, that it is 'nicely and carefully balanced, that it is made up of 'different bodies, each of which has proper functions 'assigned to it, to which it confines itself, and that by 'the proper discharge of its duty it controls and prevents 'excess in any of the others.' We have Blackstone's 'theory that the King represents power, the Lords re-'present wisdom, and the House of Commons represent 'good intentions, and that each of them discharges its 'functions without in the slightest degree trenching upon 'the functions of the other. We have indulged in these 'dreams long enough; let us awake from them and see 'what is the reality. No doubt the time was when the 'King had predominant power in England; but who can 'say that is the case now? Without going into details,

[1] See *Times*, March 5, 1879.

'it is sufficient to say that the regal power is of such a 'nature now that it really affords no strong or sufficient 'check or balance at all in our Constitution. I am old 'enough to remember when the House of Lords measured 'itself with the House of Commons and challenged or 'overthrew its decisions. Who can say it is so now? That 'check also has departed. The fact is, the whole power 'of executive administration is vested in the Govern-'ment of the day, and that depends for its existence 'upon the House of Commons; and the whole power of 'this country,—all that we have read of as divided among 'the different estates of the realm,—has really now 'entirely centred itself in the House of Commons, and 'everything turns upon its will. I say that, so far from 'these things being a complicated system of checks and 'balances, our Constitution has been reduced to a state 'of what I can only call tremendous simplicity. We 'have put all on a single foundation; all depends upon 'the House of Commons, upon their ability to conduct 'the business of the State properly; all depends upon 'their being able and willing to keep the Ministers of 'the Crown within bounds, and to fulfil their duties to 'the State. We have, instead of a complicated Consti-'tution, the most elementary Constitution in the world 'now. We have simply an elective Assembly, and in 'that elective Assembly all the powers of the State are 'really gathered up, and in it they are centred. If that be 'so, and if that elective Assembly misconduct itself, the 'only remedy is to go back to the constituencies from 'which it is elected and to refer the matter to them, and 'from their decision there is no appeal, however momen-'tous it may be. Having a body to which we have given 'the whole power over the State in this country, which

'really has the single supreme power, which everything 'bows before, we should take care that it is fit for the 'discharge of that duty.'

In reference to the development of the House of Lords, it may be questioned whether the conduct of Mr. Gladstone's Government in 1871, when it superseded an adverse vote in the Lords on a Bill for the Abolition of Army Purchase, which had already passed the Commons, by issuing (whether in pursuance of a temporary power given by the 49 Geo. III., c. 126, s. 7, or in the exercise of an undisputed prerogative) a Royal Warrant which effected the object of the Bill without the assent of the Lords, marked any deliberate indifference to the opinion of the Lords' House in comparison with that of the House of Commons. Very protracted and acute debates, in which the most eminent lawyers on all sides of the House took part, arose on all the constitutional questions involved. The result was, as is usual in such cases, that the fire of party politics presented many a shadow which could only disappear at a later time, when the subject emerged into the clearer daylight of calm and critical research. The question rather belongs to a later stage of this inquiry, when the relation of Ministers to Parliament is under discussion; but even at this stage it must be remembered (1) that, assuming that the Government had the alternative, at the outset, of proceeding either by Royal Warrant or by Bill, the Government might properly be credited with a preference for proceeding by Bill, only for the purpose of providing more minutely for the multifarious claims involved, and not with any intention of incurring the slightest risk of failing to accomplish the deliberate intention of

the Crown. According to this view, a rejection of the Bill by the Lords might be held either to amount to a want of confidence in the Government, or to a breach of the loyal trust which the different branches of the Constitution must practically be able to repose in one another. Again (2) the recognised, though rarely resorted to, practice of forcing the opinion of the Lords' House by the multiplication of Peers, so often as the exigencies of the Government demand it, is a precedent which at least suggests that the Crown assumes to have a control over the votes of the Upper House, of a kind which might well justify the use of a far less inconvenient and unpopular machinery. Nor is this practice of commanding the votes of the Lords in favour of the policy of the Crown by a large creation of Peers a less real part of the Constitution, because it has been resorted to, actually or by threat, only in seasons of great political discord, and discloses a feature of the Constitution which it is difficult to harmonise with the recognised independence of the different branches of the Legislature, and which, if it reappears in the future, will take more and more the character of a revolutionary act, and less and less that of an orderly constitutional process.[1]

[1] See Hallam's discussion of the Peerage Bill, introduced by Sunderland under George I. for limiting the House of Lords, after a few more creations, to its actual numbers, carried with ease in the Upper House, but rejected by the Commons. In summing up the arguments *pro* and *con* in reference to the unlimited prerogative of augmenting the Peerage, Mr. Hallam says that while in the opinion of some, whether erroneous or not, the prerogative has actually been exerted with too little discretion, the arguments against any legal limitation seem more decisive than the reasoning the other way. 'The Crown has been carefully restrained by Statutes, and 'by the responsibility of its advisers; the Commons, if they trans-'gress their boundaries are annihilated by a proclamation; but

In these cursory remarks on the constitutional aspects of the controversy which arose out of the Royal Warrant for the Abolition of Purchase in the Army, it need scarcely be said that no argument is offered or involved as to the political expediency of the step in question, or as to what may be called the moral propriety of giving, through the medium of a fresh precedent, renewed weight to an already threatening advantage which the Executive Government has acquired over each House of Parliament, and especially over the House of Lords.

Some years afterwards, on May 13, 1879, Mr. Gladstone himself, in the course of a speech on another subject, incidentally and briefly gave an account of the transaction from his own point of view. In answer to some members who in the course of the current debate had severely condemned the exercise of the prerogative, he said: 'I have not the smallest objection to that con-'demnation, if their minds lead them to that judgment

'against the ambition, or, what is much more likely, the perverse 'haughtiness of the aristocracy, the Constitution has not furnished 'such direct securities. . . . It is true that the resource of subduing 'an aristocratical faction by the creation of new peers could never 'be constitutionally employed except in the case of a nearly equal 'balance; but it might usefully hang over the heads of the whole 'body, and deter them from any gross excesses of faction or oligar-'chical spirit.'—Hallam, *Const. Hist.* chap. xvi. See also *Parliamentary History*, vii. 589. The history of this Bill, and of the later exercise and threatened exercise of the prerogative in the matter, sufficiently proves the existence of the prerogative itself. Mr. Hallam does not seem to advert to the fact that, inasmuch as it is in effect the Government who create new peers, and the House of Commons who create the Government, the prerogative is rather a mark of the ascendency of the House of Commons over the House of Lords than an independent constitutional check on political extravagance on the part of the Lords.

'upon an important action taken at an important 'crisis. But I did not detect from the speeches of 'either or both gentlemen that they were in the 'slightest degree aware of the ground of that exercise 'of the prerogative. Now, the ground of that exercise 'of the prerogative was this—and it is necessary that 'there should now be said what was said at the time, but 'apparently it has not found a place in the recollection 'of either of them. The ground for the exercise of that 'prerogative was this: It had been brought to the 'knowledge not only of the Government, but of Parlia- 'ment and of the entire community, that there was 'bound up with the working of the system of purchase 'a system of flagrant illegality—an illegality in many 'instances mixed up with personal complications, but 'at any rate an illegality of the nature and character 'of which there was not the slightest doubt—an il- 'legality which was imbedded in the system of extra- 'regimental prices for commissions; and that system 'was inseparable from the system of purchase. It was 'to put a stop to an illegality, and for no other purpose, 'that the prerogative of the Crown was exercised.'

As an interesting contrast to the view here presented of the circumstances and prospects of the House of Lords, a short extract may be inserted from a letter of Lord Macaulay's, when Member of Parliament for Leeds. The letter is dated from the House of Commons, June 6, 1833. Referring to a vote of censure on June 3, in reference to the Portuguese policy of the Ministry, carried by the Duke of Wellington in the Lords' House by a majority of 79 votes to 69, and in immediate anticipation of a counter-resolution which was carried in the Commons on the 6th (the date of

the letter) by 361 votes to 98, Lord Macaulay writes as follows: 'You know that the Lords have been foolish 'enough to pass a vote implying censure on the Ministers. 'The Ministers do not seem inclined to take it of them. 'The King has snubbed their Lordships properly; and 'in about an hour, as I guess (for it is near eleven), we 'shall have come to a Resolution in direct opposition 'to that agreed to by the Upper House. Nobody seems 'to care one straw for what the Peers say about any 'public matter. A Resolution of the Court of Common 'Council, or of a meeting at Freemasons' Hall, has often 'made a greater sensation than this declaration of a 'branch of the Legislature against the Executive 'Government. The institution of the Peerage is evi- 'dently dying a natural death.'[1]

A further and more instructive contrast, because arising from events of later date and more momentous importance, is supplied by the conduct of the Duke of Wellington in 1846, at the close of the three nights' discussion in the House of Lords on the Repeal of the Corn Laws. The Duke said that 'the Bill for the 'Repeal of the Corn Laws had already been agreed to by 'the other two branches of the Legislature;' that under these circumstances 'there was an end of the functions 'of the House of Lords;' and that they had only to comply with the project sent up to them—'a sentiment,' says Lord Beaconsfield, in his 'Life of Lord George 'Bentinck,' 'the bearing of which seems not easy to dis- 'tinguish from the vote of the Long Parliament which 'openly abrogated those functions.'[2]

[1] *Life and Letters of Lord Macaulay*, by G. O. Trevelyan, M.P., vol. i. p. 297.

[2] *Life of Lord George Bentinck*, p. 228.

The modifications which have been made in the composition and quality of the House of Commons are of a far more distinct and unmistakable character than those just adverted to in the case of the Lords. These modifications are expressed in well-known Acts of Parliament, carried after long discussion in and out of the two Houses, and the operation of which has since been incessantly and minutely scanned for purposes of political calculation or conjecture. The Reform Act of 1832 had for its object mainly the remedy of staring abuses, such as not even the most persistent stickler for adherence to the forms of the older English Constitution could honestly defend. The Act of 1867, and the tentative measures which prepared the way for it, though also directed to the remedying of abuses, were still more designed to bring the recognised Constitution into harmony with needs and occasions to which only very recent times had given birth.

Two principles have contended for supremacy in all attempts to reform the composition of the House of Commons; and the actual history of the country has exhibited a certain amount of deference to both principles simultaneously. One principle has been that of the representation of indefinite groups of the population, and the other that of the representation of individual persons. Bearing in mind the feudal history of county representation, and what may be called the municipal history of borough representation, and the history of the various special franchises which have grown out of these two, or side by side with them, it is well at once to dismiss the idea that in England it has ever been recognised as part of the Constitution that an

individual[1] right to vote at Parliamentary elections accompanies either (1) a liability to be taxed, or (2) a liability to serve in any public office, or (3) the mere ownership of any kind of property, or, least of all, (4) general amenability to the laws of the land. The fact is that in England the idea of representation, indefinite as it is at the best, has from the earliest times so diffusively penetrated the Constitution, that individual voters seem at the first, and for long afterwards, to have been almost lost sight of, in view of the fact that some among their number attended at election-time on behalf of all members of the class. It was never doubted that the class-interest, if separable from the national interest, would be as exactly appreciated and as competently protected by one member of the class as by another.[2] The clearly-conceived notion of individual as contrasted with class

[1] This word, 'individual,' disposes of all the misleading analogies which have been deduced from the case of the American colonies as advocated by Edmund Burke, and the cases of existing dependencies of England, the claims of which to share in the counsels of the Imperial Legislature are sometimes urged by an appeal to such maxims (rightly or wrongly construed) as 'No taxation without representation.'

[2] If minute proofs are wanted of any historical allegations here made or conclusions drawn, reference is made to the late comprehensive and exhaustive researches of Professor Stubbs, in his Constitutional History of England. It is quite useless, in treating of Constitutional History, to cite isolated historical facts, or even indiscriminately to accumulate authorities. The merit of Professor Stubbs's book is, that for every critical epoch in the development of the Constitution, he recites, year by year or even month by month, every one of the relevant events that occurred, sifting the authorities to the utmost, and rather leaving the reader to draw his own inevitable conclusions, than forcing upon him any foregone opinions or favourite views. In some of these respects he contrasts most favourably with every one of his predecessors, including Mr. Hallam, and of his contemporaries, including Mr. Freeman.

representation, which is in fact a growth of the present reign, is one among a variety of important political consequences which are the result of a series of social and economical changes which have rapidly been brought about during very recent times. These changes express themselves in a high differentiation of labour, in a novel distribution of employments and occupations of all sorts, perhaps even in an increased domesticity and privacy in the conduct of life, and in the vast variety of pursuits, tastes, desires, and dispositions, which modern inventions and contact with foreign countries are increasingly bringing about. Such a progressive transfer of political importance from the class to the individual person, is a typical instance of the more general phenomena now recognised as characterising the history of all the parts of an advancing community. It is useless, then, to seek, as is often done, by strained interpretations of history, to find an explanation of Mr. Disraeli's Reform Bill of 1867 in any broad principles of representation which really prevailed before 1832. All that is in common between the notions of the past and the notions of the present is, that the House of Commons is and continues, in theory at the least, a representative Assembly; that freehold property in land continues to be the most conspicuous of all bases of the franchise; and that, both now and of old, the weight of the land interest and the municipal corporations taken together far overbalances, in fact, any aggregate force which might be presented by a combination proceeding from any other represented class. What is of moment here is, not so much the political alteration which has been brought about, as the new starting-point from which all future reforms of the House of Commons will proceed. These

reforms will ever keep primarily in view the claims of citizens as individually excluded from the exercise of the suffrage; and whatever tests may be taken of the electoral capacity of the voter, those tests must theoretically be regarded as applied to the members of the excluded body one by one, and not to the body as a whole. There may always remain vast numbers of persons who, for some reason or other, will be without a vote; but these persons will be less and less capable of description, for purposes of political inclusion, by reference to any group, body, class, profession, occupation, or sex to which they belong. To make this more clearly understood, it is only necessary to refer to the debates which take place, session after session, on proposed alterations of the franchise. In discussing, for instance, the claims of farm-labourers to the franchise, little attention has been paid by the advocates of change or their opponents to supposed interests or rights of the general body of farm-labourers as an aggregate mass distinct from other groups of the population. The argument almost invariably turns upon the grounds of distinction between the political situation of a typical farm-labourer, taken as an individual specimen of the class and viewed amidst all his surroundings, domestic, social, and educational, and other persons in the community,—as, for example, lodgers and workmen in towns, —to whom the franchise has been already conceded. It is a particular and personal contrast, man by man, and not class by class. Of course, the numbers of the class, the general depression or elevation of its members in the social scale, and even its comparative worth when placed side by side with other classes, are always held relevant to the inquiry; but the argument always re-

solves itself at the last into the question whether it is for the good of the community (or, in other persons' mouths, whether it is a normal development of the Constitution) to allow persons to be registered as voters, who are generically described as fulfilling certain conditions of competency, and not as belonging to any more or less clearly determined class or group in the community.

It is an inquiry of the utmost importance whether the notion of representation itself, and of the representative character of the House of Commons, has undergone, or is undergoing, any changes arising from the altered aspect in which it is thus seen that the constituencies throughout the country are being regarded. This inquiry, however, will be more conveniently deferred till after certain distinct changes have been adverted to, which are the direct consequence of the new and strong light cast of late years upon individual political claims and responsibilities, as contrasted with the interests and claims of broad but ill-determined classes. These changes have expressed themselves in the Parliamentary Elections Act (constituting election-judges) of 1868, and the Ballot Act of 1872.

With respect to both these Acts it may be noticed that the extravagant growth of bribery and corruption which it was their chief object to arrest or punish was a natural consequence of a lengthened process of transition from the older theory of representation by classes to the modern theory of the representation of individual persons. It was not unnatural, nor out of harmony with other historical vicissitudes through which the country has passed, that a period should intervene during which the class unity of interest and of political

conviction had lost its reality, and yet the conscience of individual voters had not yet been sufficiently informed and roused into healthy and independent activity. This was a period at which it might be expected that all sorts of narrow and indirect influences, sometimes under the most specious titles, might dispute for the ascendency over the minds of dependent or indigent voters. Even where these influences have not taken the scandalously immoral form of direct bribery, a variety of social relationships, at times and in some parts of the country preserving much of a feudal shape, have annihilated the individual voter, without compensating him, as in the older time, by upholding the corporate interests in which he was concerned. Indeed, even immediately after the passing of the Reform Bill of 1832, when the great blow had been struck at the supremacy of the aristocracy over the borough constituencies, the theoretic legitimacy of the indirect influence of property was still openly maintained in the House of Commons by so conscientious and cautious an authority as Sir Robert Peel. In opposing the introduction of the ballot in 1833 he said: 'It has been said 'that the ballot would destroy the influence of property. 'I will confidently assert that if the influence of pro- 'perty in elections were destroyed, the security of all 'property and the stability of all government would be 'destroyed with it. It is surely absurd to say that a 'man with ten thousand pounds a year should not have 'more influence over the legislature of the country than 'a man with ten pounds a year. Yet each is only 'entitled to a single vote. How could this injustice, 'this glaring inequality, be practically redressed except- 'ing by the exercise of influence? How could the

'Government end but in a democracy, if the influence 'were merely according to numbers?'[1]

It is not necessary to say more in reference to this now obsolete notion, than to advert to the fact that the main argument by force of which the Ballot Act of 1872 was finally carried was, that in order to secure the individual independence of voters it was necessary to do all that could be done to strike at the root of the influence, direct or indirect, which could be exerted by large landed proprietors, or by the employers of labour generally.

Other effects of the Ballot Act, whether contemplated or not, have undoubtedly told in the same direction of isolating the voter from a variety of kinds of pressure under which he was often overwhelmed, and leaving him to consult nothing else, in judging between candidates, than the dictates of his own conscience and deliberate political convictions. It was said indeed by Mr. John Stuart Mill, and is still felt by many of those who are the most earnest vindicators of political liberty, that the effect of the Ballot must be to impair political conscientiousness, by hiding out of sight the fact that the franchise is at least as much a trust to be publicly exercised as a right to be privately enjoyed. With every deference to the fine moral susceptibility which alone could dictate this reasoning, it may be said that it is a question of fact whether, in the particular circumstances of a country, and at a particular time, a public trust can be exercised at all by the bulk of the population. The Ballot is a machinery to protect the individual voter, not against the nation on whose behalf

[1] Guizot's *Memoirs of Sir R. Peel*, p. 64.

he exercises the trust, but against all sorts of illicit pressure, outrage, clamour, intrusiveness, curiosity, and confusion, which, on so solemn an occasion as that of recording a vote for a member of the Legislature, may disconcert even the strongest-minded voter, and which voters of average mental strength and intelligence may be wholly unable to bear up against. When it is said that those on whose behalf a trust is exercised have a claim to see how it is exercised, it must first be ascertained that the wrong persons do not stand in the way and prevent the right persons from overseeing what is done. The Ballot Act is another indication that a voter in the present day is less responsible to the immediate group or class to which he happens to belong, or which is nearest to him, than he is to the country at large. He has, on the contrary, to be forcibly extricated from the fetters with which his accidental surroundings bind him, in order to discharge his duty to those who are out of sight. He may indeed, and it will soon appear that a wise voter will, connect himself with new and artificial combinations; but these will be voluntary, or of his own construction. He may be the better fitted to discharge his great trust by all sorts of helps and contrivances which he obtains from co-operation with his fellows. The policy of the Ballot Act has only been to afford him a mode of liberation from the effect of the hampering ties of neighbourhood or social relationship, with which neither he nor the country at large ought in this matter to have any concern. It would be a political and not a constitutional criticism to make any comment here on the actual working of the Ballot Act, whether in respect of public morals or of the orderliness of elections. It is sufficient to say

that, since the passing of that Act, great as have been the complaints of its alleged effect on the distribution of parties, no complaint whatever has been made in any authoritative quarter of its failing to secure an unprecedented freedom for the private voter in exercising the trust confided to him, nor of its deadening or weakening political zeal and the activity of political combination.

A short passage may here be inserted from a conversation reported in the Life of the late Mr. George Grote, who is well known to have been the most consistent and philosophic supporter of the Ballot, both in and out of Parliament. The conversation took place in 1870, just at the time when Mr. Gladstone's Government, through Lord Hartington, showed themselves willing to support a bill for the Ballot, or at least not to oppose one. In answer to the question, addressed to Mr. Grote, whether he would not feel great satisfaction at seeing his favourite measure triumph over all obstacles, he said: 'I should have done so, had it not 'been for the recent alteration in the suffrage. Since 'the wide expansion of the voting element, I confess 'that the value of the Ballot has sunk in my estima-'tion. I do not, in fact think the elections will be 'affected by it, one way or another, as far as party inter-'ests are concerned.' On his interlocutor observing, 'You will at all events get at the genuine prefer-'ence of the constituency in choosing their candidate,' Mr. Grote replied: 'No doubt; but then, again, I have 'come to perceive that the choice between one man 'and another, among the English people, signifies less 'than I used formerly to think it did. Take a section 'of society, cut it through from top to bottom, and

'examine the composition of the successive layers. 'They are much alike throughout the scale. The 'opinions, all based upon the same social instincts; 'never upon a clear or enlightened perception of *gene-* 'ral interests. Every particular class pursuing its own, 'the result is, a universal struggle for the advantages 'accruing from *party* supremacy. The English mind 'is much of one pattern, take whatsoever class you 'will. The same favourite prejudices, amiable and 'otherwise; the same antipathies, coupled with ill-'regulated, though benevolent efforts to eradicate hu-'man evils, are well-nigh universal: modified, naturally, 'by instruction, among the highly-educated few; but 'they hardly affect the course of out-of-doors sentiment. 'I believe, therefore, that the actual composition of 'Parliament represents with tolerable fidelity the Bri-'tish People. And it will never be better than it is, for 'a House of Commons cannot afford to be above its own 'constituencies in intelligence, knowledge, or patriot-'ism.'[1]

The chief relevancy of this passage—if regarded as more than an interesting record of the later opinions of one who is more responsible than any other single man for what is, in any view, a momentous constitutional alteration—is that it shows that a remedy, such as the Ballot, for particular evils, will be valued and valuable, not only in proportion to the absolute magnitude of those evils, but in proportion to the relative magnitude of them when compared with other evils. So long as the constituencies were small, bribery and corruption were among the main obstacles to political freedom and

[1] *Life of George Grote*, p. 313.

honesty. Bribery and corruption are just as bad since the constituencies have been enlarged, and the Ballot, so far as it is effective at all, is as effective a remedy for them as ever; but with the growth of the constituency other evils, arising from the temporary depression, vulgarity, or selfishness of large masses of the people, come into view. The champion of the Ballot, consequently, feels that he has only attained his end at a moment when a fresh vista of maladies, to be grappled with by a new generation, discloses itself. This is one out of a multitude of proofs that the Constitution is an organic whole, and not made up of separate fragments, so that even the most hopeful measure of reform depends for its success on the concurrent success of a vast number of other reforms.

The House of Commons, after much vacillation in its action, which, considering the moral issues at stake, cannot be regarded as other than culpable, assented to a really practical measure for detecting and punishing corrupt practices at elections, in 1868—that is, a year after it passed the Reform Act of 1867, and four years before it passed the Ballot Act of 1872. The operation of the Parliamentary Elections Act of 1868 was to transfer from the older tribunal of a special Committee of the House of Commons to one of the Judges of the High Court of Justice the jurisdiction exercised in the case of alleged wrongful practices at elections. The new procedure has the advantage, first, of securing a regular trial in accordance with the well-known principles of judicial evidence, conducted before a judge who, from his training and obvious impartiality, may be expected to preside over the inquiry with as little political concern in the issue as he would have in the event of an

ordinary criminal trial. The question has arisen as to whether, by assenting to this Act, the House of Commons has for ever parted with its undoubted jurisdiction in cases of election petitions. Under the Act, the Judges make their report to the House of Commons, and in the course of their report they are required to state whether they believe the corrupt practices have extensively prevailed. On the presentation of this Report it might be held to be competent for any Member to propose, and for the House to take, any further steps which might commend themselves, without being further bound by the Act. But it would appear from the debate which took place in the House of Commons on Feb. 9, 1875, that it is no longer practically competent for the House of Commons to do other than carry out the logical results of the Reports of Election Judges. The sitting Member for Stroud had been declared by the Election Judge not duly elected, but the Judge added, in a last paragraph of a long Report, that he had no reason to believe that corrupt practices had extensively prevailed. On the proposition for issuing the new writ for Stroud being resisted, in the face of the exculpatory Report of the Election Judge, Mr. Disraeli, as Prime Minister and Leader of the House of Commons, made a speech which derives some importance from the exactness with which it seems to have expressed the mind of the House. Mr. Disraeli said, in fact, that the House of Commons could not refuse to issue a writ for Stroud without abrogating the Election Petition Act, and, as he says, asserting the authority of the House 'independently of the other 'Estates of the Realm.' Referring to the Act itself, Mr. Disraeli says: 'In that Act there were certain 'powers given to the Judges, which the House of Com-

'mons waived, after ample discussion, after great 'thought, and with a due sense of the sacrifices they 'were making. If we were now to announce that 'because the decision of a Judge acting under such 'authority does not please us, we are to come to a deci-'sion contrary to that which according to the provisions 'of the law has been made public, I can only look upon 'it that if this Motion were carried the authority of that 'Act would be entirely superseded. I am not prepared, 'however, to supersede or abrogate that Act. I believe 'that it has worked well for the country and for the 'House of Commons.' He concludes his speech by saying: 'I trust the House will not allow itself to deviate 'into a path so dangerous and difficult as the one that 'has been indicated, and which we have been recom-'mended to pursue to-night. I am sure if we do we 'shall open up a scene of confusion which will not easily 'end, and no question of a contest will ever come before 'the House without some proposition being made, so 'unconstitutional in its character that the result must be 'the degradation of the authority of Parliament and the 'reduction of all our powers to make ourselves useful to 'the country.'[1]

If the last fifty years have been distinguished by a more sincere desire on the part of the House of Commons to secure the purity of elections, and thereby to make its own representative character comport strictly with the requirements of the existing Constitution, it is not surprising that the notion of representation itself, as applied to the House of Commons, has of late been

[1] *The Times*, Feb. 10, 1875.

exposed to much critical inquiry, and has undergone, and is still undergoing, no small amount of change.[1] The familiar idea attached to the word 'representation' is so widely diffused throughout every part of domestic and social life, in all but the most primitive conditions of society, that it is not necessary here to examine or refine upon all the thoughts and associations which the word calls up. Suffice it to say, that political representation means something very different when society is highly civilised and complicated, from what it must mean when the wants and sentiments of the people said to be represented are simple, constant, and uniform. The most elementary acquaintance with the history of representative government in England brings to mind the fact that the functions of the early parliaments were, in a legislative sense, rather negative than

[1] The history of 'representation' in Europe has been investigated by M. Guizot in his 'Representative Government,' and by other writers. The result of these inquiries, so far as the modern English Constitution is concerned, is as follows: (1) Political representation means something very different in different ages and different states of society. (2) The earliest known form of representation, as exhibited in the States of Modern Europe, is found in the Councils and Synods of the Church, and in the various devices resorted to by the Church for reconciling the claims of independent Christian communities with the ever-growing claims of a centralised authority. (3) In accordance with these facts, the earliest kind of representation was the reverse of what is now meant by delegacy. (4) The feudal system introduced a new starting-point for representation, but the ecclesiastical precedent suggested its machinery, and probably influenced its spirit. (5) The later history of representation is mainly marked by a growth of activity and independence on the part of the constituent body, and so implies a recurrence to the very earliest form of ecclesiastical representation, when the Christian commonalty was really supreme. The whole question must also be looked at in its connection with the history of federal government.

positive. Called together for the briefest time, they were required simply to answer whether those by whom they were deputed, and whose intentions they were assumed to know, would or would not make the King the grant of money he required. But their acquaintance with their constituents was intimate enough to enable them not only to seize the occasion for stating and remedying all sorts of local grievances which might otherwise have been overlooked, but also to become the mouthpiece of a growing national sentiment common to all the constituencies, and to consolidate their own position by originating legislation, and even directing, as occasion served, the general policy of the country. The next stage in the history of representation only differs from the former one in that the relations of the King and the people, as ascertained and controlled by the representative Assembly, no longer turned principally upon expedients for raising money. The national sentiment has become more and more self-conscious, and the wants of the several constituencies less capable of easy expression, or of reduction to a common form. But the idea of representation is still as persistent as ever, and even in proportion as the reproduction in a legislative Assembly of the sentiments of distant constituents becomes necessarily less exact, the necessity for having those sentiments impressed upon the Government policy becomes increasingly urgent, and the moral obligations of so-called representatives assume a more refined, more cogent, and certainly not less substantial shape, than in the days of old. This stage of transition is marked by the growing prevalence, in the minds of candidates themselves, of such views as those expressed by Mr. Burke in his well-known speech to the electors of Bristol in 1774.

The passage will be found cited in full on a later page, in connection with the subject of the contrast between the ideas of representation and delegacy.

The present period may be said to exhibit a highly advanced condition of the later stage of representation here denoted. The purposes of having the clear popular will, if only that could be deciphered, reproduced and enforced in the Houses of the Legislature —(for the House of Lords must be treated for many purposes as also a representative Assembly)—are that, (1) the different sections of the population throughout the country have a vast variety of separate needs which ought to be made known when legislation is contemplated, and, (2) the aggregate population entertains —or in times of vigorous political life is assumed to entertain—decided political convictions on general home and foreign policy, to which, sooner or later, and whether by a facile or a rough mechanism, it will determine to give effect. Thus the reality, nature, and value at any time of a representative system turns upon whether the people on their side have clear views of their own wants, and fixed sentiments in respect of a national policy; and whether those whom they choose to be the organs of their needs and opinions in the Legislature are competently acquainted with the fact of those needs and opinions, and are sternly conscientious enough to do all that their constituents themselves would in the same place do to give effect to them.

The forms in which the representative problem here indicated is manifested are the current controversies as to, 1, how far a Member of Parliament is or is not a mere delegate, and, 2, how far a true representative system ought to provide for the representation of mino-

rities as well as of majorities. Both these controversies are greatly affected by the transcendent fact of the existence of government by party, a subject which in its recent aspects will be shortly discussed by itself.

1. It is inevitable that, considering the enormously wide range of modern political interests, local and national, and the breadth and strength of political sentiments which at certain moments are capable of being roused into action throughout the country, the question should be always presenting itself afresh, as to whether a Member of the House of Commons can and ought to bind himself to reproduce the views of the bulk of his constituents with the literal faithfulness of a deputed delegate or ambassador; or whether, knowing the wishes and feelings of his constituents, and finding them to be in general harmony, and on leading topics even coincident, with his own, he is entitled or bound to approach the task of legislation with a mind and conscience wholly unembarrassed by previous promises, and to revert in thought to that special section of the community which has elected him so far only as he believes the opinions and feelings of that section to be of such weight that they ought not to be left out of account in ascertaining and giving effect to the determinations of the general national will.

Nevertheless, the line is so fine between an allegation of opinion bearing on future measures and a distinct promise to act in accordance with that opinion when legislation becomes imminent, that so long as personal relationships continue to connect a Member with a definite section of the population—a principle of the English Constitution which seems likely to last for

some time to come—a Member who votes on an important topic in contravention either of the opinions he was believed to hold at the time of his election, or of the predictions of his action which he held out to his constituents, will be held liable to discredit unless he returns his trust into their hands. Perhaps the earliest, and certainly the most discriminating and philosophic, attempt to exhibit in a systematic shape the kind of reconciliation that ought to be effected between the relations of a Member to his constituents and his relations to the country at large, if the true genius of the English Constitution is to be strictly conformed to, is found in Mr. Burke's speech at Bristol in 1774, already alluded to. 'Certainly, 'gentlemen,' says Mr. Burke, 'it ought to be the happiness and glory of a representative to live in the 'strictest union, the closest correspondence, and the 'most unreserved communication with his constituents. 'Their wishes ought to have great weight with him; 'their opinion high respect; their business unremitted 'attention. It is his duty to sacrifice his repose, his 'pleasures, his satisfactions, to theirs; and, above all, 'ever, and in all cases, to prefer their interest to his 'own. But, his unbiassed opinion, his mature judgment, 'his enlightened conscience, he ought not to sacrifice to 'you, to any man, or to any set of men living. These he 'does not derive from your pleasure; no, nor from the law 'and the constitution. They are a trust from Providence, 'for the abuse of which he is deeply answerable. Your 'representative owes you, not his industry only, but his 'judgment; and he betrays, instead of serving you, if 'he sacrifices it to your opinion. My worthy colleague 'says, his will ought to be subservient to yours. If that

'be all, the thing is innocent. If government were a 'matter of will upon any side, yours, without question, 'ought to be superior. But government and legisla- 'tion are matters of reason and judgment, and not of 'inclination; and what sort of reason is that, in which 'the determination precedes the discussion; in which 'one set of men deliberate, and another decide; and 'where those who form the conclusion are perhaps three 'hundred miles distant from those who hear the argu- 'ments? To deliver an opinion is the right of all men; 'that of constituents is a weighty and respectable 'opinion, which a representative ought always to rejoice 'to hear; and which he ought always most sincerely to 'consider. But authoritative instructions; mandates 'issued, which the member is bound blindly and im- 'plicitly to obey, to vote, and to argue for, though con- 'trary to the clearest conviction of his judgment and 'conscience; these are things utterly unknown to the 'laws of this land, and which arise from a fundamental 'mistake of the whole order and tenor of our Constitu- 'tion. Parliament is not a congress of ambassadors 'from different and hostile interests; which interests 'each must maintain, as an agent and advocate, against 'other agents and advocates; but Parliament is a 'deliberative assembly of one nation, with one interest, 'that of the whole; where not local purposes, not local 'prejudices ought to guide, but the general good, 'resulting from the general reason of the whole. You 'choose a member indeed; but when you have chosen 'him, he is not member of Bristol, but he is a member 'of Parliament. If the local constituent should have 'an interest, or should form a hasty opinion, evidently 'opposite to the real good of the rest of the community,

'the member for that place ought to be as far as any 'other from any endeavour to give it effect.'[1]

It is clear that if once the extreme notion of delegacy and of the legitimacy of pledges given by candidates becomes prevalent, there are no bounds whatever to the amount of vulgar servility which may be the general consequence. Some very scrupulous candidates—like the late Mr. John Stuart Mill, in his candidature for Westminster—have shrunk even from taking the position of inviting election at the hands of the constituents on behalf of whom they allowed themselves to be put forward. They have held that no kind of personal obligation, even of the nature of gratitude for the conferring of a favour sought, ought to hamper the free action of an elected Member. Mr. Mill, indeed, took the amplest opportunity of acquainting the constituency with his opinions, and of answering questions addressed to him. There is little doubt that his freedom of speech, and his stern refusal to conform in the minutest degree with the known wishes of portions of the constituency, even in reference to indifferent topics, contributed much to his not being re-elected. The opinion held on the subject by Lord Macaulay, at the beginning of his political life, is so forcibly put in one of his lately published letters, that it is worth citing at full length.

'The practice of begging for votes is, as it seems to 'me, absurd, pernicious, and altogether at variance with 'the true principles of representative government. The 'suffrage of an elector ought not to be asked, or to be 'given, as a personal favour. It is as much for the

[1] Mr. Burke's 'Speech to the Electors of Bristol, on his being declared by the Sheriffs duly elected one of the representatives in Parliament for that city.'

'interest of constituents to choose well, as it can be for 'the interest of a candidate to be chosen. To request 'an honest man to vote according to his conscience is 'superfluous. To request him to vote against his con-'science is an insult. The practice of canvassing is 'quite reasonable under a system in which men are 'sent to Parliament to serve themselves. It is the 'height of absurdity under a system under which men 'are sent to Parliament to serve the public.

'While we had only a mock representation, it was 'natural enough that this practice should be carried to 'a great extent. I trust it will soon perish with the 'abuses from which it sprang. I trust that the great 'and intelligent body of people who have obtained the 'elective franchise will see that seats in the House of 'Commons ought not to be given, like rooms in an 'almshouse, to urgency of solicitation; and that a man 'who surrenders his vote to caresses and supplications 'forgets his duty as much as if he sold it for a bank-'note. I hope to see the day when an Englishman 'will think it as great an affront to be courted and 'fawned upon in his capacity of elector as in his capa-'city of juryman. He would be shocked at the thought 'of finding an unjust verdict because the plaintiff or 'the defendant had been very civil and pressing; and, 'if he would reflect, he would, I think, be equally 'shocked at the thought of voting for a candidate for 'whose public character he felt no esteem, merely 'because that candidate had called upon him, and 'begged very hard, and had shaken his hand very 'warmly. My conduct is before the electors of Leeds. 'My opinions shall on all occasions be stated to them 'with perfect frankness. If they approve that conduct,

'if they concur in those opinions, they ought, not for 'my sake, but for their own, to choose me as their 'member. To be so chosen I should indeed consider as 'a high and enviable honour; but I should think it no 'honour to be returned to Parliament by persons who, 'thinking me destitute of the requisite qualifications, 'had yet been wrought upon by cajolery and importunity 'to poll for me in despite of their better judgment.

'I wish to add a few words touching a question 'which has lately been much canvassed; I mean the 'question of pledges. In this letter, and in every letter 'which I have written to my friends at Leeds, I have 'plainly declared my opinions. But I think it, at this 'conjuncture, my duty to declare that I will give no 'pledges. I will not bind myself to make or to sup- 'port any particular motion. I will state as shortly as 'I can some of the reasons which have induced me to 'form this determination. The great beauty of the 'representative system is that it unites the advantages 'of popular control with the advantages arising from a 'division of labour. Just as a physician understands 'medicine better than an ordinary man, just as a shoe- 'maker makes shoes better than an ordinary man, so a 'person whose life is passed in transacting affairs of 'State becomes a better statesman than an ordinary 'man. In politics, as well as every other department 'of life, the public ought to have the means of check- 'ing those who serve it. If a man finds that he derives 'no benefit from the prescription of his physician, he 'calls in another. If his shoes do not fit him, he 'changes his shoemaker. But when he has called in a 'physician of whom he hears a good report, and whose 'general practice he believes to be judicious, it would

'be absurd in him to tie down that physician to order 'particular pills and particular draughts. While he 'continues to be the customer of a shoemaker, it would 'be absurd in him to sit by and mete every motion of 'that shoemaker's hand.

'And in the same manner, it would, I think, be 'absurd in him to require positive pledges, and to exact 'daily and hourly obedience, from his representative. 'My opinion is, that electors ought at first to choose 'cautiously; then to confide liberally; and, when the 'term for which they have selected their member has 'expired, to review his conduct equitably, and to pro-'nounce on the whole taken together.'[1]

The question is considerably affected by another question which, from recent symptoms, seems likely to come into early prominence—that of the duration of Parliaments. It is well known that it was only by an historical accident, by means of a doubtful constitutional expedient resorted to for the sake of preserving the continuity of the existing Parliament at the time of the accession of the House of Hanover in the person of George I., that triennial were converted into septennial Parliaments. Obviously, the theory of delegacy, as opposed to that of a less fettered system, recommends itself from the constituent's point of view just in proportion to the duration of Parliaments, that is, to the length of time for which the member will be out of the practical control of those who have elected him. This is not the place to discuss the general question of the comparative value of longer or shorter Parliaments, which is bound up with various other considerations

[1] G. O. Trevelyan's *Life and Letters of Lord Macaulay*, vol. i., p. 277, seq.

besides that of the completeness of popular representation to which they severally tend to give effect. It must be noticed, however, that, considering the political changes brought about by mere efflux of time, and the modifications of opinion which lengthened experience on all sides must create, as well as the fact of new generations of the people incessantly coming to the front and claiming a voice in the national councils, the question of the length of Parliaments is one on which no small portion of the controversy as to the sort of representation which is henceforward to prevail must largely depend.

2. It was said in an earlier part of this chapter, that the distinguishing feature by which the most recent reforms of the House of Commons are characterised is the deference paid to the situation and political claims of the individual person, as contrasted with those of any body, class, or group of the population to which he is believed to belong. This changed and changing point of view has been signalised, as was seen, among other things, by an increase of provision for securing a free and deliberate expression of the opinion of every individual voter. The voter has been liberated as far as possible from all enforced subservience to any persons by whom he happens to be surrounded, and who in a different condition of society might be held legitimately entitled to direct, or at least to influence, his political choice. For a moment it might seem that such changes, especially when somewhat violently wrought by Acts of Parliament, would be attended by all the evils of individualism, political insulation, and competitive selfishness of the narrowest kind. But here, as in other well-known fields, a compensatory provision is instantly introduced,

As the old vanishes, it lays bare the seeds, which it had long concealed and protected, of what is better and higher. The involuntary and accidental grouping of citizens may be indeed dislocated and shattered; but in its place there are shooting up on all sides a variety of new growths, of every degree of exuberance and promise. To some pensive minds the old seems the more natural, and therefore to be regretted, while the new, having in it a greater admixture of conscious human activity, and therefore of avowed imperfection, is obnoxious because of its artificiality, and the whole process seems to them to be a substitution of mechanism for life. But that is in the truest sense natural which is found by long experience and observation best to reveal and expand the individual and social nature of man. Whatever man in the exercise of his political or other faculties is led to contrive or invent, he may claim to have inherited as his natural and original birthright.[1] It thus comes about that the moment of the political liberation of the individual citizen from the swaddling-clothes of class or property influence, which he had outgrown, is also the moment of the manufacture of new expedients for binding citizens together in organised groups, which shall enable every individual citizen to economise to the utmost, and employ the most effectively, the force with which the Constitution endows him.

Of these voluntary efforts to secure the most highly economised use of political force, the various devices which have been suggested for the representation of minorities are among the most conspicuous. Sir

[1] Compare Aristotle, Pol. i. 2. '*Οἷον γὰρ ἕκαστόν ἐστι τῆς γενέσεως τελεσθείσης, ταύτην φαμὲν τὴν φύσιν εἶναι ἑκάστου.*'

G. C. Lewis, indeed, in an article in the *Edinburgh Review*, on the 'Representation of Minorities,' written in July 1854, went so far as to argue that the representation of minorities was already one of the most essential elements of the English Constitution. He said, indeed, that the parliamentary system was exclusively founded on the representation of minorities; for no member of Parliament was elected by more than a small section of the electors, and the principle of territorial division secured that smaller towns, and counties with the smallest populations, should be represented in fact very nearly on a par with the largest towns and most populous counties. It is an undoubted fact that in all attempts to reconstruct the basis of the franchise, any scheme for what are sometimes called 'equal electoral districts' has at present very little chance of support from more than an inconsiderable number of members in the House, and perhaps even of the thinking population outside. The only distinct effort which has been made by Parliament to introduce a trial of the system of representing minorities has been through the medium of the Reform Bill of 1867, by which all the towns which under that Bill returned three members—i.e., Manchester, Liverpool, Birmingham and Leeds—and the City of London, which was to return four—were to afford to the minority of the constituents at general elections the opportunity of returning one member. This was effected by disabling voters from recording their votes in favour of more candidates than one short of the number of members to be elected. It has been found in practice that where the numerical majority is sufficiently large, it is possible so to distribute the votes that the majority may, even under this system, com-

mand all the seats; but it has also been found that the minute arrangements demanded for this purpose are far more applicable to great provincial and manufacturing towns, where the voters are already familiarly known to each other, as well as already organised for a variety of other purposes, than in such places as the City of London, where only the slightest possible influence can be brought to bear on voters by those who endeavour to direct the election.

There are two principles on which schemes for minority representation may be advocated. One is, that local minorities have a claim to be heard in the House of Commons in the same numerical proportion as they bear to the majority outside the House. According to the other principle, it is alleged that though the minority has no claim to have its existence recognised in the House for the purpose of controlling the representatives of the majority, and therefore it would be inexpedient to afford representation to minorities generally in proportion either to their local or to their aggregate strength out of doors, yet that the genuine theory of popular representation would be most fairly deferred to, and the House of Commons best invigorated, by allowing minorities which have attained a certain degree of respectable prominence to have such a number of representatives as would preclude the notion that in the case of any important debate the voice of the minority could not be distinctly and even loudly heard.

So far as the question in England is concerned, or has been concerned in late years, the subject is complicated with another question which in fact is wholly distinct from it. The best-known advocates in England of systems of minority representation—that is, Mr.

Thomas Hare and Mr. John Stuart Mill—have combined the advocacy of this reform with a recommendation to substitute throughout the country, in a greater or less degree, what may be called personal for local representation. The main object in the contemplation of these advocates seems to be, to counteract that sort of haphazard minority representation which Sir G. C. Lewis referred to as effected in practice by having places of unequal population equally represented in the House. Their general device is, so to readjust the whole representative system, that, on all the votes of the country being polled, the majority and the minorities—or rather their aggregates—should be represented in the House in exact numerical proportion to the numerical proportion they bear to one another outside the House. In this way, it is not so much that minorities are represented, as that a large number of existing minorities are by aggregation converted into majorities; and instead of its appearing in the House that the whole country is of one mind, because a bare majority in the bulk of the constituencies overbalances the minorities in them, the true balance of sentiment and political opinion is exhibited in the House with the utmost attainable exactness. The essence of this scheme, even when extended over lesser areas than that of the whole country, is seen to contravene what at present appear to be some of the most rooted institutions, not to say prejudices, to be found in the country; and it is not necessary now to discuss the expediency of endeavouring to alter these institutions or to correct these prejudices. The schemes alluded to must qualify the character of the House of Commons as a deliberative and executive body, a far greater onus of responsibility being cast

upon it on its deliberative side, and a far greater freedom being permitted to it on its executive side. To the extent that all the elements of the national political life are reproduced on the floor of the House of Commons, the discussions now conducted outside the House, the result of which is to determine the relations of the majority to the minority, must be increasingly conducted inside the House. The House must come to feel that it has less and less any distinct mandate from the country, and its independence must be vastly increased at the expense of the constituencies throughout the country, so soon as these have performed their functions of choosing acceptable mouthpieces. This must be the tendency of things, though shorter Parliaments, and the fact of party government, may do much to modify its effect. It is obvious, then, that schemes for minority representation of this kind include far more in their purport than a mere provision against the chance of important classes of the people having their voices wholly unheard in the Legislature, because they are not yet numerous enough to command a majority of votes in more than perhaps a very few places.

The real value of minority representation must rather be tested in the simpler cases in which it is now applied to the five great towns already enumerated. Those who object to this sort of representation are wont to argue that, to the extent to which it has been introduced, it does more than merely prevent the voice of the minority being silenced in the House, and that it either counteracts the legitimate force of the majority, or discloses an apparent balance of opinion and political determination which does much practically to disfranchise the places represented. To throw light on the

question, it is necessary to consider what are the claims to exclusive representation, which a majority in a particular place represented may be held to possess. Of course there may be true majorities and false majorities. A false majority exists where—owing either to dormant political activity, or ignorance, or slavish subservience to discreditable influences—a small minority chances to acquire at election time the power of converting to its own uses the numerical majority of the voters. A true majority is where every voter who goes to constitute the majority acts as a free and independent citizen, with a competent knowledge of the issues at stake, and with a fixed determination to give effect to the promptings of his reason and conscience. Where such a true majority exists, and is, as it must be by the hypothesis, unanimous in support of a candidate, the only reasons why its vote should not be either counteracted or modified in effect by the presence of an equally true minority are, (1) the advantage to the country generally of obliging every class of opinions to be submitted to the somewhat rough test of popularity before they become the basis of legislation, and (2) the advantage to the House of Commons of having a distinct and uniform direction given to its counsels by what is taken to be,—say, for purposes of public convenience only,—the undivided popular voice. It is sometimes held that there is some inscrutable virtue in the decisions of a majority, however small, and that it has a moral right, even if it should not have the physical force, to assert an uncontrolled ascendency. Whether these beliefs are held to be democratic, republican, or anything else, they are most unsafe foundations on which to build any cogent political argument. It is impossible to say too much—and much has been said—

on the necessity, in the most democratically constituted societies, of favouring the growth of new and varied opinions,—to be held for a long time, it may be, by very narrow sections of the community; and political, religious, and social freedom would become impossible, and truth extinct, if the idea ever gained ground that the political or other beliefs of a numerical majority afforded any test of their inherent value, or could found a claim for undisputed supremacy.

In spite, however, of these salutary deductions from the conceit of those who panegyrise the merits of popular majorities, plébiscites, and the like, a sound and popular form of government presupposes that Government shall in its main acts and policy not only follow a uniform and decided course, but that that course shall commend itself to at least a considerable portion of the population; and if two or more decided and uniform courses present themselves, the only mode of choosing between them is that of ascertaining which is acceptable to the greater number of people.

The claims of a majority to decide elections being thus found to rest solely upon the convenience of a uniform administration, and the imperious necessity of making an absolute choice between the wishes of one set of persons and those of another, the limitations to these claims are at once indicated; and it is in these limitations that the claims to representation on the part of minorities can alone be discovered. The fact is, that the assertion of the political claims of minorities is just so far out of harmony with the working of popular institutions as the area over which a particular election extends is small, and may be consistent with them as the area becomes very large. Thus, in very small

boroughs, the result of representing minorities must be purely anarchical. In the largest boroughs, the results are perhaps more doubtful, but still very questionable so far as the interests of true popular government are at stake, and may tend to weaken or paralyse political activity of the broadest and healthiest kind. The most hopeful, or perhaps the only hopeful circumstances in which the so-called representation of minorities can be carried out are, in case of such a complete reconstruction of the constituencies and of the modes of eliciting the judgment of voters as is contemplated in the schemes of Mr. Hare and Mr. Mill, and in the vast extension of the area of every election which these schemes suppose.

Closely akin to this subject is another to which much attention has been lately called, and which seems likely to bring about important results in the practical working of the Constitution. It has been already seen that the displacement of the more primitive classification of English society is being succeeded by voluntary political organisations of a variety of kinds, and possessing various degrees of publicity. Among these organisations the most recent growth is that of large groups of electors, who voluntarily connect themselves together for the purpose of establishing the principles upon which they shall select a candidate, and of giving effect to their determinations. Such associations naturally invite public attention and criticism; and, according as they are constructed in favour of one set of principles or another, are likely to meet with vituperation at the hands of the advocates of a different set of principles. In England, indeed, such vituperation has become of late matter of common notoriety; and the worst names;

borrowed from the most abused or misunderstood institutions of other countries, have been used for the purpose of discrediting them. The truth is, that no general propositions whatever can be framed as to the common policy, expediency, or virtue, of any such associations. These associations may be either of the worst and narrowest sort, chosen, if chosen at all, by a mere plausible show of popular selection, and dominated by influences of the most pernicious or intolerant sort, whether aristocratic, plutocratic, or demagogic in the most objectionable sense. Or, on the other hand, these associations may be the natural outcome of a vigorous political life, and of a general resolve in the constituency to subordinate the casual wishes or caprices of smaller sections within it to the general good of the whole, or to the service of the State. They may be elected by the most stringent method which has ever been devised for recording a popular choice; the association may be large in numbers, and every member of it may be competently instructed and free to act on his independent judgment, saving always his loyal recognition of the distinct objects for which the association is created; the meetings may be in public and the discussions enlightened and checked by concurrent controversies in the local newspapers; and the true political relationships between such an association and its own constituency on the one hand, and the candidates whose claims come before it for consideration on the other, may be unerringly and delicately appreciated. It is impossible not to see, in such an association as this, and in the multiplication of such associations, the best possible hope which in this country can for some time be entertained for the establishment or renovation of popular government of the truest sort.

The task of such voluntary associations as these, whether of the better or the worse kind, is simplified, and the character and direction of their work determined, by the existence of what is called 'government by party,'—a subject which in its recent aspects requires independent investigation. It is a matter of the utmost consequence to ascertain what are the real nature and advantages of party government as now existing in England, and to discover what are the prospects of its development, or of any substitute for it being found. There is no doubt that, on the face of it, government by party presents many stumbling-blocks to the scrupulous observer of parliamentary institutions. He is apt, on a superficial glance at them, to see in the contests of party a sort of fictitious battle-field, in which the rival hosts have assorted themselves only for the purpose of playing a gigantic game. In the spurious struggles which are exhibited, all independent and conscientious convictions seem to be treated as matters of indifference if not of scorn, while the party-cries which for the moment rally the combatants on one side or the other owe their origin to the purest accidents, or, what is still worse, to nothing better than astute contrivance.

This view, which undoubtedly points to some of the extravagant abuses to which party government often gives rise, has been resisted by all the ablest modern speculators on constitutional government, commencing with Edmund Burke, in the familiar passage contained in his 'Thoughts on the Causes of the Present Discontents.' The following is part of the passage alluded to:—'Men 'thinking freely will, in particular instances, think 'differently. But still, as the greater part of the 'measures which arise in the course of public business

'are related to, or dependent on some great, leading, 'general principles of government, a man must be 'peculiarly unfortunate in the choice of his political 'company, if he does not agree with them nine times 'in ten. If he does not concur in the general principles 'upon which the party is founded, and which necessarily 'draw on a concurrence in their application, he ought 'to have chosen some other, more conformable to his 'opinions. When the question is in its nature doubtful, 'or not very material, the modesty which becomes an 'individual, and (in spite of our court moralists) that 'partiality which becomes a well-chosen friendship, will 'frequently bring on an acquiescence in the general 'sentiment. Thus the disagreement will naturally be 'rare; and it will only be enough to indulge freedom 'without violating concord or disturbing arrangement.'

Leaving, however, on one side, as the limits of the present treatise demand, the general explanation and defence of government by party, it is sufficient to examine the grounds on which the institution may be held to rest in England at the present time.

Party government in England rests upon three foundations, which may be conveniently designated as (1) historical, (2) natural, and (3) artificial.

1. The historical foundation of modern parties is undoubtedly the division of sentiment and action which took place between the times of the abdication of James II., and of the firm establishment of the House of Hanover about the time of the accession of George III., —a period of about seventy years. No doubt, for the purposes of finer philosophical and historical analysis, the origin of existing political parties might properly be attributed to times, events, and political or religious

divisions far earlier than the period of what is known as the Revolution. But it seems to have been the broad division of opinion in respect of the paramount authority of Parliament over the very sources of regality, long expressed in the opposed titles of Whig and Tory, which, under all the changes since experienced, whether overt or latent, is still reproduced and indeed emphasized in the great rival parties of the present reign. Whether or not the terms Liberal and Conservative square with the older terms, or what relation the new terms have to the old, is a question which belongs more to the political historian than to the constitutional critic. It is, however, a matter of some constitutional importance to notice that party government in England is not the growth of a day, or even of a hundred years, but that it is almost as firmly impressed on the character of English institutions as the modern conception of representative government itself.

2. But government by party has perhaps a still more indisputable origin and justification in certain antithetical forms in which the human mind seems to be cast, and in which, when addressing itself to political affairs, it seems spontaneously to operate. It is not the case that at any given moment a large mass of mankind are specially indifferent to the political progress of the country, or are inordinately stupid, ignorant, selfish, or timid, while the rest of mankind have a firm faith in the prospects of political improvement, and an unflinching courage in venturing on any amount of change which seems fairly calculated to bring it about. The truth in this respect would rather be, that all persons whatsoever, while unthinking, insulated, and inexperienced, are disposed to flinch from taking any

further step in politics than holding firmly on to all which is familiar and seems at least secure. All political action, when it is anything else than a mere grasping after personal or selfish ends, implies a certain amount of confidence in the result of a yet untried experiment. It has well been pointed out by the best political logicians that politics, in truth, admit of no tentative experiments. No concurrence of political circumstances, personages, and events can ever be reproduced a second time; nor has the political inquirer any but the most limited power to control, for the purpose of ascertaining the true relations of cause and effect, the arrangement of the materials in his hands, nor any method but that of the loosest historical analogy, or contemporaneous observation of other countries, to remedy the inherent defects of the experimental method when applied in this field. While, on the one hand, the politician, no less than the physical experimentalist, is bound to take the utmost pains to master every one of the relevant facts accessible to him, he can at the best only use them for the purpose of conjecturing the sort of modifications which may and ought to qualify the application of principles which are purely deductive. It is by his deductive method, and by his confident attachment to the conclusions which that method has taught him, that the politician attains the elevation of a scientific prophet. This method not only teaches him how to form sound intellectual judgments, but informs his moral insight, and suffuses his whole nature with the glow of unalterable convictions. Thus it comes about that the science and art of politics can for practical purposes be beneficially studied only by those who either themselves have the capacity of forming in this way political

judgments, or who have the modesty and discretion to rely on those authorities who are gifted with a capacity they do not share.

The object of this somewhat detailed investigation is to show that if there are real and natural differences of a strongly marked kind between the mental habits of one class of political thinkers and those of another, these differences cannot be found in a mere opposition of political method, inasmuch as for all political students the only available political method is one and uniform. Nevertheless, very familiar experience teaches that there are to be found, even among the ablest and most conscientious political students, certain obvious diversities, be it of temperament, taste, long-inherited prejudices, or, it may be, mere rate of intellectual action. Whether these diversities are permanent as the nature of man, or national and transitory, it is not now necessary to inquire. Suffice it to notice as a fact, that after all political inquiries have been exhausted, and all the best-accredited methods applied, there is exhibited in the two classes of investigators severally a residuum of feeling, on the one hand in favour of supporting, and perhaps normally developing, that which exists, and on the other hand in favour of passing as rapidly as possible to some new and untried state of society, in which, at the risk of any loss of existing advantages, the mass of current evils may disappear. This distribution of fears and hopes must be taken as a natural foundation of party division in the English Parliament.

3. Again, even if the natural sources of party opposition and strife were absent, and the historical antecedents were different from what they are, there would still be found potent reasons, in the interests of

orderly and consistent government, for devising artificial methods by which all the inevitable differences of opinion characterising the various members of a large representative assembly could be so marshalled and arranged that, for purposes of executive action, some considerable amount of unanimity should be attained. This can be effected (1) by selecting for points of union only those broad principles and distinctly understood measures which, after long discussion in and out of Parliament, every member of the House, as he is elected to it, may be presumed thoroughly to understand, and promptly to support or oppose. Side by side with this method it would be expedient (2) to encourage, with respect to all other questions, not selected as the badge of party union, the utmost freedom of independent action and expression. A vast number of questions—including, for instance, the whole of criminal law reform, and the bulk of the measures for the social or moral improvement of particular classes in the community—belong to this list. A complementary method (3) is, to facilitate in particular cases the process by which a member may be held entitled to consult his independent convictions, or certain obligations of an equally cogent kind, in the place of the immediate interest of the party to which he belongs. As a matter of fact, very little encouragement is shown at present to defections of this sort, and whenever they occur the member who is guilty of them is invariably put to the utmost pains to defend his action, and in the opinion of his own party never does succeed in freeing himself from the imputation of disloyalty, not to say treachery. Nevertheless, if the grounds on which an individual departure from the ranks of party may be justified were clearly

ascertained and publicly announced, it is probable that not only would the institution of party government be rid of much of the moral suspicion with which it is in some quarters regarded, but its true nature and objects would be better appreciated throughout the country; adhesion to his party would be held more consistent with the most scrupulous susceptibility of a man of honour; and, on the whole, in the absence of a slavish terrorism, the obligation of party ties would be more undeviatingly deferred to.

The last fifty years of English political life have been signalised by nothing more conspicuous than the breaches of party ties committed by the most eminent statesmen, in the presence of emergencies in which the forces of each party were strained to the uttermost in opposing the other. As a specimen of the sort of defence which the practice, if not the theory, of the Constitution seems to admit in a case like this, the following words of Sir Robert Peel, in his speech on the Catholic Emancipation Bill, delivered in March, 1829, may be adduced:—'I cannot,' he said, 'purchase the 'support of my honourable friends, by promising to 'adhere at all times, and at all hazards, as minister of 'the Crown, to arguments and opinions which I may 'have heretofore propounded in this House. I reserve 'to myself distinctly and unequivocally the right of 'adapting my conduct to the exigency of the moment, 'and to the wants of the country. . . . This has been 'the conduct of all former statesmen, at all times and in 'all countries. My defence is the same with that of all 'others under similar circumstances, and I shall con-'clude by expressing it in words more beautiful than 'any which I myself could use—I mean, the words of

'Cicero—*Hæc didici, hæc vidi, hæc scripta legi, hæc de sapientissimis et clarissimis viris, et in hac republicâ et in aliis civitatibus monumenta nobis litteræ prodiderunt, non semper easdem sententias ab iisdem sed quascunque reipublicæ status, temporum inclinatio, ratio concordiæ postularent, esse defendendas.*'[1]

The modern effects of government by party in facilitating the construction of an executive Government, and in ascertaining the constitutional relations between the Cabinet and Parliament, will be discussed in a later chapter. The inconvenience of separating the topics by interposing a review of the modern situation of the Crown is an instance of the difficulty or impossibility of keeping in view all the elements of the Constitution at the same moment, and yet of the absolute necessity of doing so.

[1] Guizot's *Memoirs of Sir Robert Peel*, p. 40.

SECTION II.—PRIVILEGES AND ORDER OF PROCEEDINGS.

The composition of the two Houses of Parliament, as settled during the present reign, the current idea and actual mechanism of the representative system, and the general modes in which, both in and out of Parliament, the task of government is carried on with a certain degree of consistency and uniformity, have thus been investigated from a purely constitutional point of view. Not less relevant, however, to a true account of the structure of the Constitution is an inquiry into the more detailed processes by which the Houses of Parliament, and especially the House of Commons, have, by the united operation of long custom and recent artificial contrivances, acquired the capacity of securing order in the conduct of business, and of reconciling to the utmost the independence of individual members with the claims of the assembly in its corporate capacity on the one hand, and of the public outside the House on the other. To this subject belongs the consideration of what are called the 'privileges' of members or of the House, and the 'standing orders' and resolutions made by the House for the regulation of its proceedings.

The later history of the House of Commons has exhibited a steady progress in the direction of maintaining, not only publicity in its proceedings, but the freest possible avenues for communication with the public outside the House. Prominent among these avenues are the facilities opened out during the last hundred years, and largely developed during the pre-

sent reign, for approaching the House of Commons by petition. Whether Mr. Hallam's opinion is to be followed, that the great multiplication of petitions wholly unconnected with particular interests cannot be traced higher than those for the abolition of the Slave-trade in 1807,[1] or Sir T. Erskine May's opinion is to be preferred, that the modern system of petitioning was first called into activity in 1779 by the organisation created to promote measures of economical and parliamentary reform, which, commencing among the freeholders of

[1] See Mr. Hallam's account of what is known as the Kentish petition, in 1701, *Constitutional History*, chap. xvi. Mr. Hallam cites in a note a paper in reference to this petition entitled 'Vindication of the Rights of the Commons,' written either by Harley or Sir Humphrey Mackworth. After quoting the Statute of Chas. II. against tumults on pretence of presenting petitions, the writer of the paper says: 'By this statute it may be observed, that not only 'the number of persons is restrained, but the occasion also for 'which they may petition; which is for the alteration of matters 'established in Church or State, for want whereof some inconvenience may arise to that county from which the petition shall 'be. For it is plain by the express words and meaning of that 'Statute that the grievance or matter of the petition must arise 'in the same county as the petition itself. They may indeed 'petition the King for a parliament to redress their grievances; 'and they may petition that parliament to make one law that is 'advantageous, and repeal another that is prejudicial to the trade 'or interest of that county; but they have no power by this Statute, nor by the Constitution of the English Government, to direct the parliament in the general proceedings concerning the 'whole kingdom; for the law declares that a general consultation 'of all the wise representatives of parliament is more for the safety 'of England than the hasty advice of a number of petitioners of a 'private county, of a grand jury, or of a few justices of the peace, 'who seldom have a true state of the case represented to them.' Mr. Hallam mentions the Septennial Bill of 1717, against which several petitions were presented from corporate towns, as affording the earliest instance of any merely political petition.

Yorkshire, extended to many of the most important counties and cities in the kingdom,[1] there is no doubt that the right has now become firmly established to petition either House of Parliament in language 'respectful and temperate, and free from disrespect to the 'Queen, or offensive imputations upon the character or 'conduct of Parliament or the Courts of Justice, or 'other tribunal or constituted authority.'[2]

Petitions to the Lords may give occasion to debate, and members who present petitions constantly avail themselves of this privilege by expressing their acquiescence in, or disapproval of, the prayer of the petition. It was not till 1839, when it was found that the debating of petitions threatened to become the sole business of the House of Commons, that that House took the step of prohibiting all debate upon the presentation of petitions. This prohibition was embodied, in 1842, in standing orders dealing with the whole subject of the presentation of petitions. By these orders, the Speaker is required 'not to allow any debate, 'or any member to speak upon or in relation to' a petition, except 'in the case of such petition complaining of some present personal grievance, for which 'there may be an urgent necessity for providing an 'immediate remedy.' As a specimen of the spirit in which this rule has been interpreted, it was decided on June 14, 1844, that a petition complaining of letters having been detained and opened at a post-office, and praying for inquiry, was not of that urgency that entitled it to immediate discussion; while a similar

[1] May's *Constitutional History*, vol. ii. p. 63.
[2] May's *Parliamentary Practice*, chap. xix.

petition presented on June 24 in the same year, complaining that 'letters are secretly detained and opened,' whereby a 'present personal grievance' was alleged, was permitted to open a debate.

The next, and perhaps in the circumstances of modern society the more important, avenue to communication between the Houses of Parliament and the country is secured by the effect of the publication of the proceedings of the two Houses, and of the general permission accorded to strangers, including reporters for the public press, to be present at the debates. The great contest between the claims to secresy asserted by the House of Commons on the one side, and the claims to publicity asserted by the public on the other, has been waged within the limits of the present reign. The first stage of the controversy, commencing with the case of Stockdale *versus* Hansard, marked what the House has a right to publish; the second stage, denoted by the resolution of 1837, marks what the House has a right to keep secret.

The question at issue in the case of Stockdale *versus* Hansard[1] was whether the House of Commons is entitled to print and publish documents which are laid before the House, and thereupon become part of its proceedings, in spite of the fact that they contain defamatory matter, and would be held libellous in a Court of Law. An action had been brought against Messrs. Hansard, printers to the House of Commons, for printing and publishing, in accordance with an order of the House, a book described as 'Reports of the Inspectors of Prisons of Great Britain,' in which

[1] *Adolphus and Ellis's Reports*, 1. *Broom's Constitutional Law*, 870.

reports a book of the plaintiff's, found among the prisoners in Newgate, was mentioned as being of a 'most disgusting nature, and the plates indecent and 'obscene in the extreme.' The report complained of had been made, on the 2nd of July, 1836, by a committee of the Court of Aldermen, in consequence of the report of the Inspectors of Prisons in reference to the gaol at Newgate, and had been afterwards laid before the House of Commons, and ordered to be printed by the House. On a later day, the 25th of July, the House of Commons ordered to be printed a copy of a further communication from the Inspectors of Prisons, made in reference to their previous report. On the 18th of March in the following year, the House of Commons, in compliance with the recommendation of a Select Committee, directed that parliamentary papers and reports printed by order of the House should be sold to the public at certain specified rates. On an action being brought by Mr. Stockdale, the Lord Chief Justice Denman, who tried the case, took occasion to say that 'the fact of the House of Commons having 'directed Messrs. Hansard to publish all their par-'liamentary reports is no justification for them, or for 'any bookseller who publishes a parliamentary report 'containing a libel against any man.' In answer to this, the House agreed to a resolution on May 31, 1837, that 'the power of publishing such of its reports, 'votes, and proceedings as it shall deem necessary, or 'conducive to the public interests, is an essential inci-'dent to the constitutional functions of Parliament, 'more especially of this House as the representative 'portion of it.' And further, that 'for any person to 'institute a suit in order to call its privileges in ques-

'tion, or for any court or tribunal to assume to decide 'upon matters of privilege, inconsistent with the 'determination of either House of Parliament thereon, 'is contrary to the law of Parliament, and is a breach 'and contempt of the privilege of Parliament.'[1] The struggle terminated in the passing, in the year 1840, of an Act[2] which recited that 'it is essential to the 'due and effectual exercise of the functions and duties 'of Parliament, and to the promotion of wise legisla- 'tion, that no obstructions or impediments should 'exist to the publication of such of the reports, papers, 'votes, or proceedings of either House of Parliament, 'as such House of Parliament may deem fit or neces- 'sary to be published;' and enacted that it should be a sufficient defence, in case of any proceedings arising from such publication, to produce a certificate under the hand of the Lord Chancellor, or the Speaker, as the case may be, to the effect that the publication took place by order or under the authority of the House of Lords or the House of Commons.

The other side of the same privilege in respect to the publication of its proceedings, in accordance with which the House of Commons can restrict as well as enforce publication, was illustrated in the year 1875. In the year 1837 the House of Commons had agreed to a resolution which forbade in general the publication of evidence or of documents brought before Select Committees of the House. On April 9, 1875, the 'Times' and the 'Daily News' published, under the heading 'Committee of Foreign Loans,' evidence received by such a Committee, which was then sitting. This evidence,

[1] May's *Parliamentary Practice*, chap. v.

[2] 3 and 4 Victoria, chap. ix.

as published, included a letter to Mr. Lowe, M.P., from M. Herran, Honduras Minister in Paris, read to the Committee by Mr. Kirkman Hodgson, M.P., and which reflected seriously (and, as it appeared, unjustly) on the character and conduct of a member of the House, Capt. Bedford Pim. The publication of the defamatory matter was made the subject of urgent complaint in the House, and the printers of the two newspapers were summoned to appear at the bar of the House, and were in attendance on the day named for their appearance. After considerable debate on that day—in the course of which Mr. Disraeli, the leader of the House, argued that, inasmuch as there was no dispute whatever either about the fact of an offence having been committed against the resolution of 1837, or as to the personal innocence and good faith of the gentlemen who had been summoned, it was not desirable to proceed any further in the matter—it was decided to dispense with their further attendance, and to communicate with the Committee of Foreign Loans in order to trace the mode in which the publication had been brought about, and to prohibit such acts for the future.

This last-mentioned debate gave rise to an incidental discussion on the general right of strangers to be present in the House during its sittings. There was no doubt that strangers, including reporters, had no other constitutional right to be present than such as the House itself might from time to time choose to concede to them. Nevertheless great inconvenience had been experienced on some occasions, and especially in the course of this debate, from the rule that all strangers might at any moment be excluded, on a single member

'taking notice' that strangers were present. A recent resolution has introduced a far more convenient rule, without surrendering the constitutional right of the House to absolute privacy. Strangers can now only be excluded by a vote of the House on the question being put by the Speaker, no discussion being allowed. This solution of the problem was found serviceable in the Session of 1878, when the personal character of an Irish landlord who had been recently murdered was incidentally brought under discussion. As the circumstances afford one of the earliest illustrations of the working of the new rule, and explain its true use and limits, it is worth while recalling them with some precision, as they are detailed in Hansard.

On April 12, 1878, Mr. O'Donnell had moved, with reference to the murder of the late Lord Leitrim, that the action of the Government in Donegal 'is unconsti-'tutional, unsuited to promote the ends of justice, and 'calculated to foster disbelief in the impartiality of the 'law.' In the course of the debate, Mr. O'Donnell put, by way of illustration, the case of a landlord known throughout all the northern country of England 'as the bad Earl,' and said: 'If it was known throughout all 'the country, beyond the possibility of a doubt, com-'mented on in the public press, denied nowhere and by 'none, that he had placed the alternative of eviction or 'dishonour before the peasant-girls on his property, and 'that when his infamous advances had been slighted, 'he had carried out his threat of eviction'—At this point Mr. King Harman said: 'Mr. Speaker, I beg to say 'that I see strangers.' The Speaker said: 'The honour-'able member having taken notice of the presence of 'strangers, I am bound to take the course I have taken

'upon a former occasion, and to put the question at 'once to the House whether strangers be ordered to 'withdraw.' The question was put, and the House divided, the Ayes being 57, and the Noes 12, and the majority for the exclusion being therefore 45. The record in Hansard is simply: 'After this division, 'strangers were excluded, and it was understood that 'the debate proceeded for some hours:—at the end of 'which time, the question was again proposed that Mr. 'Speaker do now leave the chair.'[1] It may be observed that the next morning's papers contained a report of what took place while strangers were professedly excluded, though not in any detail, and not in the ordinary course of the reports of Parliamentary proceedings.

It may be doubted, however, whether even under the newly-modified rule, the practice of excluding strangers serves the end in view,—that of securing real secresy and perfect independence. In presence of the modes of communication and the allurements to publication now everywhere diffused, it is scarcely possible that some account of lengthened, complicated, and highly-interesting proceedings shall not leak out; and the more grave the inquiry, or the more deeply it affects personal character, the more important is it that no merely partial utterances shall go forth unchallenged to the public, and that every member of the House shall conduct himself, not as belonging to an irresponsible club, but as being invested with the dignity of a public judicial officer.

The questions of privilege above noticed introduce a subject which has already been seen to be closely con-

[1] Hansard, vol. ccxxxix. 1262.

nected with all the privileges of the Houses of Parliament:—that is, the modes by which the House, acting in a judicial capacity, can practically enforce its sentences, either upon its own members, or upon other persons. The offence complained of as a contempt of the House may be committed either by members of the House or by strangers, and directed either against individual members of the House, or against the House itself in its corporate capacity. It has always been a matter of great controversy how far Courts of Justice are entitled to review the judgments of the Houses, for the purpose of ascertaining the extent of the privilege invaded, and determining whether the limits of jurisdiction have been strictly observed. The case of Howard *versus* Gossett,[1] which arose in 1840 out of the case of Stockdale *versus* Hansard, (the plaintiff being Stockdale's solicitor, and the defendant the Serjeant-at-Arms,) presents the most recent occasion on which the principles relating to the constitutional right of the Commons to commit and punish have been judicially acknowledged and explained. The Court of Exchequer Chamber reversed the judgment of the Court of Queen's Bench, which had decided in favour of the plaintiff. The Court of Exchequer Chamber asserted that the privileges of the House involved in the inquiry before the Court were indisputable, because, 'lst, that House, 'which forms the Great Inquest of the nation, has a 'power to institute inquiries, and to order the attend-'ance of witnesses, and in case of disobedience . . . 'bring them in custody to the bar for the purpose of

[1] 10 Q. B. 359. 1 Car. and M. 380. Broom's *Constitutional Law*, notes to Stockdale *v.* Hansard.

'examination; and 2ndly, if there be a charge of 'contempt and breach of privilege, and an order for 'the person charged to attend and answer it, and a 'wilful disobedience of that order, the House has un-'doubtedly the power to cause the person charged to 'be taken into custody, and to be brought to the bar to 'answer the charge; and further, the House, and that 'alone, is the proper judge when these powers, or either 'of them, are to be exercised.'

The House of Commons has of late years had to grapple with a series of problems relating to the management of its own business, which are mainly due to the inordinate growth and complication of that business, and to a greater variety in the personal characteristics of members of the House, as representing Scotland and Ireland as well as England, and as elected by a more independent system of voting than heretofore. Long experience has gradually taught the House to frame a series of rules which have seemed calculated not only to secure quiet and regularity in debate, but also to extend the utmost latitude of speech and action to individual members which could be compatible with the complete accomplishment of all the business before the House. Nevertheless, the working of such rules must depend for its success upon the common understanding that they are to be interpreted according to the intention with which they were introduced, and not strained and abused in order to defeat the general purposes of the assembly in the interests of individual licence and caprice. In the session of 1877 the House was brought face to face with a difficulty which could scarcely be foreseen, inasmuch as it arose out of the inadequacy of its own existing rules to meet a conspiracy entered into

by a knot of individual members to arrest legislation by means of that very procedure of the House the spirit and intent of which they were ostentatiously setting at defiance. A certain number of members combined together to prevent the progress of legislation, by way either of punishing the House for an alleged neglect of business in which they held themselves especially interested, or else of forcibly securing space for the interposition of that business. While the outward forms of the House seemed to be punctiliously complied with, they attempted, by dint of artificially sustaining interminable debates on worthless points, and repeatedly dividing the House on the question of adjournment, to govern the House by a compact and unscrupulous minority. The following strong language in reference to this conduct may be cited from a writer whose calm historical grasp of the true character of the English House of Commons, as well as his practical knowledge of its procedure, entitles him to especial respect. Mr. Reginald F. D. Palgrave, Clerk Assistant to the House of Commons, writes[1]: 'An attempt to injure Parliament by means of its procedure, or to lower it in the public esteem, is not so much a breach of Parliamentary decorum as a breach of faith with the State. For such an offence is the misuse of privileges and of high position, by those who are entrusted with that position by the State itself. And though it may seem strange, that, to assign a due place upon the old criminal code to so new a crime, a comparison should be sought among the lower types of guilt: still not less true is it that a Member of Parliament, who takes his seat

[1] *The House of Commons.* Illustrations of its History and Practice. By Reginald F. D. Palgrave. Preface to revised edition, 1878.

'under the sanction of the oath of allegiance, and in 'defiance of that oath employs the right he so acquires 'to inflict injury or contempt upon the Constitution, 'passes into the company of faithless trustees and of 'deserters who betray their comrades.'

While, at the time of the obstruction here referred to, the House exhibited a dignified self-restraint, and even leniency to the particular offenders, it lost no time in amending its rules in such a way as to prevent, if possible, the recurrence of such scenes, and protect the general assembly against the tyranny of small and pertinacious cliques. This was effected chiefly by the passing of a rule which empowers the Speaker of the House, after calling a member twice to order, and on his still persisting in disobedience, to name the member. As the process and consequences of naming a member have been shrouded in a good deal of obscurity, it will serve to explain them, and also to describe the operation of the new rule, if the facts of its first application, as described in Hansard, are recalled.

On the 6th of August, 1878, a debate was taking place in the House of Commons on the question of allowances to the families of reserve-men in the army for the period during which they were called out for active service. Major O'Gorman,—who seems to have had some personal ground of discontent at what had been done or not done,—repeatedly called out 'Hear, hear,' and 'Order,' in the course of the speech of Colonel Stanley, Secretary for War. The Speaker called upon 'the hon. 'and gallant member for Waterford to desist from these 'interruptions.' Major O'Gorman defended his conduct, but the Chancellor of the Exchequer urged that he should apologise, and submit himself to the ruling of

the Chair. The Speaker said: 'He owes it to the House 'to make some apology for the interruption he has 'persisted in carrying on. I must call upon him at 'once to make such apology as is due to the House.' On Major O'Gorman's refusing, Mr. Bulwer observed: 'Although the hon. and gallant member may think that 'he is not exceeding his privilege, yet now that his 'attention has been directed to it from the Chair, I am 'sure the hon. and gallant member is too good a soldier 'to refuse to submit to discipline.' Major O'Gorman replied: 'The Speaker has not called me to order. He has 'done nothing of the sort.' The Speaker then said: 'After 'what has passed, I have no other alternative left me 'but to name the hon. and gallant member for Water-'ford, for the line of conduct he has pursued this even-'ing; I now name you, Major O'Gorman, for having 'interrupted the proceedings of this House by disorderly 'conduct, and for having refused, when called upon by 'the Chair, to submit yourself to the judgment of the 'House.' Thereupon the Chancellor of the Exchequer moved, and Mr. Lowe seconded the motion, 'That 'Major O'Gorman, for his disorderly conduct and dis-'respectful behaviour towards the Chair, be directed to 'withdraw.' The motion was carried, and it was further ordered that Major O'Gorman, 'for his disorderly con-'duct and disrespectful behaviour towards the Chair, be 'directed to withdraw; that his conduct towards the 'Chair be taken into consideration to-morrow;' 'and 'that he do attend in his place to-morrow.' On the next day Major O'Gorman made an ample apology to the House. The Orders were discharged, and, in the words of Hansard, the Speaker's language in concluding the matter is 'entered upon the Votes' as follows:—

'The House has now heard the statement and apology 'of Major O'Gorman. If it should be the wish of the 'House to proceed no further in the matter, it will be 'an agreeable duty on my part to declare the will of the 'House in favour of indulgence. The House may be 'assured that, while jealous for the character of this 'House, and determined, so far as lies in my power, to 'maintain order in debate, it is with great reluctance 'that I put in force the authority of the Chair, as I felt 'bound to do on this occasion.'[1]

Besides the contest which has been thus disclosed between the House and small bodies of its own members, another intrinsically more important contest has been waged of late, and is likely to be waged for some time to come,—that is, the contest between the claims of what are called private members of the House and the Government of the day. The subject cannot be fully discussed till, in a later chapter, the situation of the Executive Government in its relations to the House has been investigated. It is difficult to sum up in a few words the comparative value of the claims to attention which may be urged generally on behalf of Government business and on behalf of the motions or bills of private members. It is by no means true that the advantage in respect of pressing importance is invariably on the side of the Government. Nor is it true that all the more important measures urged by private members are in course of time, if they deserve it, taken up by the Government. The Government of the day is at the head of a great party, and dependent for its continued existence on the fickle breath of public opinion outside.

[1] Hansard, v. ccxlii., 1380.

In selecting its measures it must always give a preference to those which are most desired, or most capable of being understood, by the people at large; and there will always remain outside the list of such measures a vast number of projects which, either from their technical character, or from their concerning only special classes of the community, or dealing with little appreciated though very real and pressing problems of government, have no chance of being promoted at all, except through the personal energy of private members. It is the great complaint among the more far-seeing statesmen of the present day, that the tendency brought about by the multiplication and crush of business in the House is either to defer indefinitely the schemes of private members as thus understood, or to interrupt them at some stage or other, so as to render legislation with regard to them impossible. In the formation of the most recent rules for the conduct of business in the House, the rival claims of the Government and of private members were kept in view, though it is yet to be seen how far they have been happily reconciled. Supposing all fear of intentional obstruction is got rid of, it would seem to be most undesirable to introduce any further restrictions than those which already exist in respect of such matters as speaking frequently in Committee, asking questions of Ministers, moving repeated amendments or adjournments, and the like; it being obvious that the Government of the day, by its command of a majority, by the confessed importance of its affairs, and by the corporate support it derives from all its members, can always do far more than hold its own. The new rules which have been tentatively adopted for expediting general business by restricting the right of members to make motions on

all kinds of topics at the time of the House resolving itself into Committee, are specimens of the sort of invasion of the rights of private members which is proceeding from the side, not so much of the Government, as of the business already recognised as being of public importance. Such rules, however, must be very elastic, and their ultimate form, if they attain any ultimate form, will probably be rather determined by the exigencies of the country at the time, and not by constitutional considerations.

What is known as the 'half-past twelve rule,' after being tried in several sessions, was adopted as a Standing Order on the 18th of February, 1879. The rule is that 'except for a money bill, no order of the day or notice 'of motion be taken after half-past twelve of the clock at 'night, with respect to which order or notice of motion 'a notice of opposition or amendment shall have been 'printed on the notice paper, or if such notice of motion 'shall only have been given the next previous day of sitting, and objections shall be taken when such notice is 'called.' On the last discussion of the rule, it was by no means unhesitatingly supported by the Chancellor of the Exchequer, who represented the Government; and it is probable that on the whole the rule rather operates in favour of private members than of the Government. Members of the Government are likely to be more persistently in their places than average private members, and a vast quantity of formal Government business which is never seriously opposed might be delayed, under the new rule, by any single member of the House putting down his name as an opposer. The business of private members, on the other hand, can benefit very little from the absence of casual interruptions of this

sort, as it has no chance of being successfully terminated without the overt support of a substantial and vigilant majority of members. On the whole, the rule betokens a salutary disposition to check an indolent, superficial, or servile mode of getting through its business, with which the load of modern legislation might be likely to familiarise the House.

One of the most practical forms in which the multitude of business before Parliament in modern times, and the perplexities attending its satisfactory discharge, are represented is to be found in that part of Parliamentary practice which relates to Private Bills. When it is remembered that one class of private bills covers almost the whole field of Government interference with burial-grounds, charters and corporations, churches or chapels, cities or towns, Crown, Church, or Corporation property, fisheries, gaols, gas-works, letters-patent, markets and police, and the other class includes almost the whole field of like interference with bridges, canals, railways, docks, drainage, embankments, harbours, piers, streets, turnpike roads, tramways and waterworks, it is seen at once that, while every other branch of legislation tends to become simpler through the acceptance of uniform principles, or to be superseded by the fact of its having been finally accomplished, there is an almost infinite field open in respect to private bills. They tend to become numerous as the arts and inventions which improve human existence become numerous, and to grow intricate as the forms of human association and the fine gradations of competing interests increase in variety and complexity. There is a true and justly apprehended danger that in no long time the business of so-called private bills will absorb the main attention of the

two Houses, to the comparative neglect of questions of general policy, home and foreign, and at the expense of all the time and energy at the disposal of their members. And yet, in view of existing emergencies and well-established policy, the Houses can now neither refuse to legislate, nor—if they would prevent corruption, tyranny, and injustice of the most flagrant sort—withhold the employment of all resources required to enable them to judge wisely and administer skilfully. The question is thus raised to one of great constitutional importance, and the practical modes of dealing with it at the present time must here be adverted to in some detail. It concerns, in fact, not only the general functions of the two Houses of the Legislature, but the essential rights in respect of personal liberty, property, and liability to taxation, of all members of the community. The right to govern, the mode of government, and the duties of the governed, are all involved. And yet the procedure with respect to private bills has hitherto almost escaped the notice of constitutional writers.

It does not appear that there has ever been any authoritative effort made to define what is a public and what is a private bill. Sir Erskine May [1] enumerates the chief cases which have occurred since 1828 in which a practical difficulty has been experienced in determining to which rank a bill belongs; and while it is broadly understood that bills having in view only the particular interest or benefit of private persons or groups of persons,—as public companies, corporations, parishes, cities, or even counties,—rank as private bills, it is yet true that

[1] *Parliamentary Practice*, chap. xxiv.

most bills concerning the metropolis have been treated as public bills; that bills concerning Edinburgh and Dublin have been treated as public or private according to their objects; that in 1839 three measures for improving the police in Manchester, Birmingham and Bolton were passed as public bills; that in 1856 a bill concerning the harbours of Dover, Ramsgate, Whitby, and Bridlington, and abolishing certain tolls and repealing local Acts, was held to be a public bill; and that in 1861 the Red Sea and India Telegraph Bill, which amended a private Act, was introduced and proceeded with as a public bill. The main distinction which governs the procedure applicable to the case of a private and of a public bill respectively is, that while, with regard to all measures whatever, the Houses do their best to protect vested interests, and to prevent unforeseen injury being inflicted on individual persons, in the case of a private bill the judicial or administrative aspect of the Houses is (at least in its earlier stages) the more prominent, and in the case of a public bill the purely legislative.

The standing orders of the two Houses with regard to private bills resemble each other in their general purport. Their provisions are extremely minute, and have to be rigidly adhered to by the promoters of the bills. The utmost pains are taken that every competitive interest shall secure a hearing, shall be efficiently advocated, and, in case the bill proceeds, shall be, if possible, compensated. Examiners are appointed to scrutinise the bill and the documents appended to it in their earliest stage, so that the time of the members of the House who form a Select Committee on the bill may not be wasted in discussing schemes which are inherently imperfect. Careful provision is made for the supply of

maps, plans, and books of reference for the information of the House and of opponents to the bill. The petitioner for the bill is obliged to make a general declaration,—to be deposited in the Private Bill Office on or before a certain day,—of the powers which are to be given by the bill; and in the case of bills for the incorporation of companies, the financial structure of the contemplated company must be given with clearness and exactness. Precautions are taken that the utmost publicity shall be secured by public advertisement, and that the fact of the petition for a bill shall be fully made known in good time to all persons who may conceivably be affected by the bill. ' Finally, by a standing order of July 1858, the Commons agreed ' that this House will ' not insist on its privileges, with regard to any clauses ' in private bills sent down from the House of Lords, ' which refer to tolls and charges for services performed, ' and are not in the nature of a tax.' This resolution has been held to extend to turnpike, harbour, drainage, and other similar bills, and the effect of it has been to enable bills which must before have been introduced in the House of Commons, to be introduced in the House of Lords.

The inordinate growth of private-bill legislation must lead within no long time to some decisive measures for relieving the Houses, and especially the House of Commons, of the engrossing burden which it casts on members. It is not of any service to contrast the importance of private and of public bills; and therefore it does not help the matter to assume that when their claims come into competition those bills which have an apparently more limited object must give place to those which seem to be of more universal concern. Any such mode of treating political questions neglects the fact of

the organic union by which the smallest and narrowest interests are bound up with what are to outward show the most comprehensive, and is deservedly stigmatised as parochial. It may probably be found, however, that the Houses may be able to delegate the important administrative and judicial inquiries which constitute the main difficulty and press of private-bill legislation to independent and permanent functionaries, who shall be sufficiently well paid to be free from all unworthy partiality, and who shall be of a class to command the respect of Parliament. A precedent for such a delegation is afforded by the recent Act for the appointment of Election Judges; and, like these judges, the functionaries instituted for other objects would have the advantage, not possessed by a Select Committee of one of the Houses, of being able to take evidence upon the spot to which the proposed legislation relates.

A large and courageous extension of the same method of subordinate government may hereafter be found serviceable or indispensable for the purpose of satisfying most of what is substantial in the claims of Ireland to self-government, and of some of the dependencies to actual representation in the English Parliament,—the judicial functionaries, in all these cases, being selected from persons who would command the confidence of their fellow-citizens in the county legislated for, as well as that of the central Legislature which receives, and will usually abide by, their report. This subject will be further discussed in the chapter on Dependencies. But it may be found interesting to cite in this place the latest opinions on the subject of the late Earl Russell.[1] 'I 'should have been very glad if the leaders of popular

[1] *Recollections and Suggestions*, 1813–1873. By John, Earl Russell, 1875, p. 351.

'opinion in Ireland had so modified and mollified their 'demand for Home Rule as to make it consistent with 'the unity of the Empire. There can be no doubt that 'the existing legislation by private bills is exceedingly 'cumbrous and expensive; that great funds are wasted 'in purchasing private interests, and in giving fees to 'lawyers for services which are neither conducive 'to the public good nor advantageous to property. It 'would have been a great advantage in lightening the 'labours of Parliament, and in promoting useful public 'legislation, if the rural parts of England, Scotland, and 'Ireland had been divided and distributed into munici-'palities springing from a popular origin, and invested 'with local powers. The principle of our Constitution, 'that no taxes or rates should be levied except by popu-'lar consent, is grossly violated by the raising of large 'sums by virtue of the orders of magistrates, named by 'the Crown upon the advice of the Lord Chancellor. 'The private bills of Lords and Commons do not violate 'this principle, but are in many instances very costly. 'The late Mr. Brassey was enabled to construct a railway 'from Turin to the Alps at no greater expense than 'was incurred in carrying a bill 'hrough Parliament to 'sanction the Great Northern Railway of England.'

There is perhaps no part of the Constitution, in its detailed working, on which more anxious care has been bestowed by the House of Commons, expressing its will either by resolutions or by standing orders, than that which determines the mode of granting supplies for the necessities of government, and seeing to their strict application to the purpose for which they were voted. According to the existing procedure, as elaborated only

within the last few years, it may be briefly stated that there are four stages which have to be travelled over before the House of Commons holds itself to have finally discharged its functions in respect of a money grant. These stages may be designated as (1), the formation of a Committee of the whole House, called the Committee of Supply; (2), the formation of a similar committee, called the Committee of Ways and Means; (3), the passing in the Commons of the Appropriation Bill; and (4), the scrutiny of the mode of applying the grant which is conducted by the Committee of Public Accounts. In compliance with two standing orders of the 20th of March, 1866, the House will receive no petition for any sum relating to the public service, nor proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the Consolidated Fund, or out of moneys to be provided by Parliament, unless recommended from the Crown; and if any motion be made in the House for such a grant or charge, the consideration and debate thereof shall not be presently entered upon, but shall be adjourned till such further day as the House shall think fit to appoint, and then it shall be referred to a Committee of the whole House before any resolution or vote of the House do pass therein. The Committee of Supply merely determines that 'a sum not exceeding a sum 'mentioned' be granted for the object or objects specified in the Estimate. The Committee of Ways and Means determines the source from which the grant shall be made, and therefore takes the initiative in dealing with all questions relating to taxation, public loans, and charges on existing revenue, or money in the hands of the Government. The Appropriation Bill

enumerates every grant that has been made during the whole session, and authorises the several sums, as voted by the Committee of Supply, to be issued and applied to each separate service. According, indeed, to a resolution of the 30th March, 1849, it was declared to be the bounden duty of the Government department which is charged with a service for which money has been voted, to take care that the expenditure does not exceed the amount placed at its disposal; but by a clause in the Appropriation Bill, in cases where delay would be detrimental to the public service, the Treasury may authorise the application of the surpluses upon some votes to the deficiencies upon others, in the grants for the Army and Navy, provided the total grant to each branch of expenditure be not exceeded. A statement is required to be laid before the House, showing all the cases in which such authority has been given, with copies of the representations made upon the subject.[1] Every diversion of the original votes is subsequently sanctioned by a resolution of a Committee of the whole House, and by a clause of the Appropriation Act of the Session. The Committee of Public Accounts was appointed by a standing order of the 3rd of April, 1862, amended on the 28th of March, 1870. The words of the Order as amended are: 'There shall be a 'standing Committee, to be designated "the Committee 'of Public Accounts," for the examination of the ac- 'counts, showing the appropriation of the sums granted 'by Parliament to meet the public expenditure, to con- 'sist of eleven members, who shall be nominated at the 'commencement of every session, and of whom five

[1] 25 and 26 Vict. c. 71, s. 26. May's *Practice*, chap. xxi.

'shall be a quorum.' Mr. Reginald Palgrave, whose work on the House of Commons has already been quoted, has the following remarks on the subject of this Committee. He says that the appointment of this Committee 'may be most emphatically described as the 'crowning act, whereby the Commons exercise at once 'the strictest and the most constitutional control over 'public expenditure. The special function of this 'Committee is to make sure, with utmost precision, 'that the parliamentary grants of each session have 'been applied to the exact object which Parliament 'prescribed; and, owing to the variety and intricacy of 'the public service, this task is not an easy one. The 'Committee also re-checks the official audit to which 'the Imperial accounts are, by law, subjected; an in-'vestigation which makes that tribunal the arbiter in 'many a perplexing dispute, and places before it the 'whole of our financial economy. These inquiries are 'reported to the House, and a complete story of the 'monetary transactions of each year is thus made public, 'on the authority of Parliament. No servant of the 'State is there who works to better or to more useful 'purpose, than those eleven members who form the 'Committee of Accounts.'[1]

It has not been necessary to review in detail the procedure of the House of Lords in points in which it differs from that of the House of Commons. According to recent practice the sittings of the House of Lords are, except on very few occasions, short, the speakers few, and all competition to speak, eagerness to speak frequently, and habits of speaking at undue length,

[1] Palgrave's *House of Commons*. Revised edition, 1878, p. 98.

absent. There is no occasion in that House to keep in view the opinion of a distant constituency rather than that of a present audience, and, no representative responsibility being confessed, few Peers take part in the debates, or attend them, but those who have a personal inclination or urgent sense of duty to stimulate their assiduity. The general contrast between the lax or elastic procedure of the Lords' House and the strict regulations which hem in the action of members of the House of Commons has been lately touched upon with a light and humorous hand by Sir W. Vernon Harcourt, M.P., late Solicitor-General. In a speech delivered on the 22nd of February, 1879,[1] he said:—

'The House of Lords enjoyed many privileges not 'possessed by the House of Commons, but on the other 'hand were deprived of many pleasures which the 'Lower House greatly appreciated. The Lords voted 'no supplies, and were sensible of no grievances. They 'had not the exhilarating amusement of discussing the 'details of the estimates, but then they had very great 'advantages. Their House was not liable to be counted 'out. They had no quorum, except that particular 'number which by the common law was sufficient to 'constitute a riot. They did not suffer from perpetual 'and vexatious motions for adjournment, for he had 'observed that there was generally a motion for adjourn-'ment made at the interesting hour of half-past seven, 'which was always received with universal and cheerful 'acceptance. The House of Commons had recently had 'some difficulty on the subject of Standing Orders. He 'did not know whether the House of Lords had any

[1] *The Times*, Monday, Feb. 24, 1879.

'Standing Orders at all, because he had remarked that 'its members were able to speak upon any subject, on 'any occasion, without restraint or regard to relevancy. 'Among other privileges the House of Lords had a 'Speaker who was always speaking, and in exchange 'for that he had no authority.[1] . . . Further, the

[1] The question as to whether the Lord Chancellor is *ex-officio* Speaker of the House of Lords was made the subject of some public discussion in the latter part of the year 1878. In a letter to *The Times* of August 3rd, 1878, the Duke of St. Albans expressed some surprise at finding the Lord Chancellor reported as claiming to be the Speaker of the House of Lords. He said: 'The theory that the 'woolsack is outside the House makes it impossible, and the fact 'that the Lord Chancellor is a member of the Ministry of the day 'makes it undesirable for the independence of the House, that it 'should be so.' At a Mansion House banquet on the same day, Lord Chancellor Cairns responded to this by saying: 'I observe to-'day that one of the highest in rank in the assembly of which he is a 'member has made the startling discovery that the Lord Chancellor 'is not the Speaker of the House of Lords. At the same time I must 'venture to think that it is because I am the Speaker of the House 'of Lords that you have done me the honour of requiring me to 'respond to this toast'—(the health of the House of Lords.) The whole antiquarian and constitutional reasoning applicable to the point was summed up in a learned letter of Mr. Locock Webb's, addressed to *The Times*, on August 6, 1878. He points out that the right of the Lord Chancellor in virtue of his office to be Prolocutor or Speaker of the House of Lords has, probably from remote times, but certainly for a period extending over upwards of two centuries, been recognised not only by custom but by standing orders of the House of Lords and by Acts of Parliament. In the recent Acts of the 14th and 15th Vict. cap. 83, and the 15th and 16th Vict. cap. 87, the Lord Chancellor is expressly recognised as Speaker of the Lords. There is no doubt, however, that the woolsack, which is the seat of the presiding Judge of the assembly in its judicial capacity, is not a seat in the House of Lords, and has occasionally been occupied by one who was a mere judicial functionary and a Commoner, and had no right to sit as a Peer of Parliament. If there is no Lord Chancellor, the Lord Keeper performs the functions of Speaker, and by a standing order of the House of Lords

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'House of Lords knew no dissolution, except that which 'the Black Rod of Nature allowed; they answered no 'questions; they gave no pledges; they had no fear of 'Liberal Four Hundreds before their eyes.' Later on in the evening the Marquis of Hartington observed that in the House of Lords 'the great science of obstruc-'tion is entirely unknown.' He thought Sir William Harcourt 'was in error in saying that they had no 'Standing Orders at all. He believed they had Stand-'ing Orders, and they had on more than one occasion 'considered them with a view to alteration; but he 'understood that their object in these alterations— 'strange as it might seem to members of the House 'of Commons—had been to encourage members of the 'House to speak, rather than to restrict the opportuni-'ties of their doing so.'

(No. 3, 19th June, 1660) it is the duty of the Lord Chancellor or Lord Keeper 'ordinarily to attend the Lords' House of Parliament.' It has been the custom to appoint several deputy Speakers, generally three, with authority to act in the Lord Chancellor's absence according to the prescribed order of precedence. The Lord Chancellor votes as a Peer, but has no second or casting vote as Speaker; and a person exercising the office of Lord Chancellor in the Lord Chancellor's absence, if he is not a Peer, does not vote.

The whole subject is one of something more than mere legal curiosity, as it affects in theory, and might affect in practice, the relations of the Government of the day, in the person of their chosen representative, to the House of Lords; and it might hereafter happen, in case of controversy as to the functions of the Lord Chancellor in directing or controlling the course of an animated debate, that the question whether he was in fact Speaker of the House, and carried with him all the recognised attributes of that office, would become one of the utmost relevancy.

Section III.—Home Legislation.

There has been no previous period in the history of the country which has been so prolific in legislation as that intervening between the close of the reign of George IV. and the present time. Looked at superficially, the mass of the legislation which has taken place might seem to be nothing more or better than a series of tentative and often spasmodic efforts to seize the first opportunity which social circumstances afforded of grappling with such of the ills that flesh is heir to as can be touched by legislation of some sort or other. Nevertheless, while making every allowance for the elements of accident, ignorance, caprice, selfishness, and vicious theorising which may have discredited recent legislation, it is true that an attentive observer can find stamped upon the statutes of the present and of the previous reign certain broad marks of political principle, which, when looked at as a whole, must be recognised as signs of constitutional movement. There are certain distinct directions in which legislation has of late been advancing, and the march in each of these directions implies a change in the functions of Parliament and in the limits of legislation, and thereby denotes a modification, or perhaps only an oscillation, of the Constitution. These directions are indicated in, 1, the removal of religious disqualifications, 2, the adjustment of chartered and endowed institutions to modern necessities, 3, the laying down of fresh principles for government interference and abstinence from interference with industry, commerce, and social economy generally, and,

4, a fresh demarcation of the relations between central and local government.

1. When it is remembered that in the year 1828 no Roman Catholic, Jew, or dissenter from the communion of the Established Church of England could be legally elected to any office relating to the government of any city or corporation, or hold any civil or military office (including the most insignificant, such as that of an exciseman, a tide-waiter, or even a pedlar); that by the form of the oath exacted from members of the Legislature all Roman Catholics, and important classes of dissenters, were excluded from Parliament, and that Jews had become excluded for the first time by the operation of the very measure which liberated other dissenters; and that between the year 1828, the date of the repeal of the Test and Corporation Acts, and 1866, the date of the Act substituting an oath not objectionable to Jews, every one of these disqualifications was swept away; there can be no doubt of a principle being asserted which is emphatically new. This principle is sometimes described as that of religious equality, and at other times as that of not allowing any disabilities, civil or political, based only on religious grounds; but so long as there is in England a Church by law established, it may be doubted whether the principle either of religious equality or of the repudiation of religious disabilities is as yet confessedly admitted in the Constitution. By the operation of the Act of Settlement, the reigning Sovereign must be one who is in communion with the Church of England. Archbishops and Bishops of the Church of England, and the ministers of no other religious organisation, form an essential element in the composition of the House of Lords. Clergymen of the

Established Church, and the ministers of no other body, are ineligible for the House of Commons. There are a variety of cases in which a legal presumption is raised that a citizen is a member of the Established Church, while no such presumption would be raised in favour of any other religious body. So long as this partiality exists, whatever may be its political recommendations, it is impossible to say that absolute religious equality is contemplated by the English Constitution. Nevertheless, the history of the present and the two preceding reigns is marked by a series of parliamentary efforts to abridge the inequalities which the situation of the Established Church had incidentally brought about, and which had seemed unjust and vexatious in proportion to the numerical increase of the non-conforming bodies, and to the general advance of doctrines favouring political freedom at every point. Some of these efforts have gone a length which to those who recall the theoretical scruples of George III. with regard to his coronation oath must seem startling and unprecedented. Among these the disestablishment of the Irish Church in 1869, the abolition of Church-rates in 1868, and the passing of the University Tests Act in 1871,—which, reciting that the benefits of the Universities should be 'fully accessible to the nation,' enacted that persons taking lay academical degrees or holding lay academical or collegiate offices in the Universities of Oxford, Cambridge, or Durham, should not be required to subscribe any religious test or formulary,—are among the most conspicuous. Nor must the institution of civil marriages by the Acts of 1837 and 1852, and the abolition of the old ecclesiastical jurisdiction in reference to Divorce and Wills by the Act of 1857, and the substitution of

a secular Court and Office presided over by a lay Judge, be regarded as events less significant. All these measures disclose a determination on the part of Parliament to treat the Established Church no longer as a sacred citadel which cannot be assaulted without incurring the reproach of profanation, but as an existing instrument for the attainment of certain intelligible ends, which, like other moral or political instruments, is susceptible of any amount of sharpening, cleansing, or recasting at the hands of Parliament, or, if these processes are insufficient, of being entirely cast on one side. It is impossible to attend to the current debates in the Houses of Parliament on such questions as the extension of the episcopate, the increased secularisation of the Universities and other places of education, and the application of ecclesiastical edifices and lands to the use of persons not within the communion of the Church, without perceiving that the sole argument held to be of any weight on either side is that of general and well-understood utility. There is surely in this a new constitutional stand-point in relation to all religious disqualifications, though it may be long before political facts adjust themselves to the constitutional principle. That the Established Church of England is destined to undergo many a transformation in accordance with the demands, not only of political justice, but of practical necessities, might be presumed from the very partial area,—namely, that of England itself and a few of the smaller dependencies,—in which it exists. In Scotland a different Church is established; in Ireland, no Church at all; and in India and the Colonies the most extreme principles of all that can be meant by religious toleration, freedom, and equality, are recognised to the full.

Thus, the only ground for maintaining what is essential in the notion of an Established Church of England must be that of some alleged peculiarity in English historical traditions, and in the actual political situation of the country. But historical traditions are most fertile in producing novel facts, and in instantly assimilating them in such a way as to impart to them an authority of their own; while political situations are constantly changing, and can therefore afford no guarantee whatever for the stability of any particular institution.

2. It is scarcely possible to appreciate the new attitude which Parliament has assumed towards endowments and endowed institutions generally, without studying some of the deep-rooted objections or prejudices by which parliamentary activity in this matter has been hindered. These objections still exist in a weakened form in many respectable quarters; but the whole force of them can only be understood by attending to the grounds upon which any legislative interference whatever was resisted, at the time when the passing of the Reform Act of 1832 had prepared men's minds for novel and courageous experiments which at an earlier date would have seemed, even to the most sanguine minds, to be of a hopeless kind. It was said generally, in answer to any scheme for amending endowments, that the existing law, as administered by the Court of Chancery and the Ecclesiastical Courts, provided sufficiently against scandalous abuses, and against any signal departure from the original purpose of the trust as declared by its founder; that the intention of the founder, strictly interpreted in accordance with the current modes of legal interpretation, ought, if the

national good faith were to be maintained in its integrity, always to prevail, in the face of any new aims or purposes which the requirements of the present age might seem to suggest; that if this intention were liable to be overruled by legislative interference all security for property itself was gone; and that the casual and temporary advantages, which might be purchased by a new adjustment of a trust, would be dearly paid for at the price of discouraging all endowments for the future, and of introducing an instability in the most solid parts of the framework of the nation which could not be regarded without serious apprehension. These arguments were met, not by ignoring their reality, nor by denying their cogency within the area to which they truly applied; but it was said that there were large classes of endowed institutions, the abuses and corruption of which were wholly beyond the power of the existing law to reach; that the legal rules for interpreting the intention of founders, being applicable mainly to the actual language used in wills and deeds, were wholly inadequate to determine the real spirit and meaning of the foundation in a state of society which the founders could never have contemplated; and that, without in the least degree weakening the confidence which future testators would have in their general designs being strictly complied with, it was yet within the power of legislative art to reconstruct all existing endowments, especially those of ancient date, in such a way as to maintain all that was most characteristic in the wishes of the founders, and at the same time to confer on the objects of their munificence a far higher advantage than had long been possible. The question thus ultimately turned on matters of fact,—that is, on

what were the kind and amount of abuses to be remedied, on the nature and limits of the remedies proposed, and on the instrumentality of which the Legislature could avail itself for the purpose in view. The answer to the question is contained in the history of the passing of the various measures of the present and the preceding reign, for the reform of (1) ecclesiastical and religious foundations, (2) educational institutions, (3) endowed charities, and, (4) municipal corporations.

(1) The internal reform of the Established Church of England, so far as the Legislature could be concerned with it, has been proceeded with in a series of measures of which the first, and perhaps the most important, is the Act of 1836 for the incorporation of Ecclesiastical Commissioners, who should have power to prepare schemes for carrying into effect recommendations already made by them under a Commission of the previous year. The constitution of the Ecclesiastical Commission has been varied by a series of Acts during the present reign, and the Commission has now become a permanent part of the structure of the ecclesiastical establishment. The problem to be dealt with in the case of the Church of England was a peculiar one, and of a kind which had no analogy elsewhere. The Church of England is not a legal corporation, nor even an aggregate company, partnership, or voluntary association of persons which might for some purposes have a unity of personality before the law. So far as the law and the Legislature are concerned, the Church of England is a mere designation of an ideal unity, which manifests itself concretely in a vast number of distinct corporations, sole and aggregate, a large quantity of landed property

vested in these corporations, a mass of rights and duties attaching to a body of ecclesiastical officials selected by certain definite legal methods, and an assemblage of rights and duties which determine or express the relations of all persons in the country towards the ecclesiastical officials, or towards the corporations which they constitute or to which they are appended. It is obvious, then, that considering all the innumerable and intricate interests concerned, and the deep and strong sentiments to which all handling of religious matters appeals, the process of reforming abuses can at the best only be slow, tentative, and, both in its methods and machinery, inharmonious and apparently dislocated. The establishment of the Ecclesiastical Commission fully recognised the complexity of the problem. Its powers of recommendation, and, at a later time, of actual administration, were most extensive and flexible; and though its main province was that of ecclesiastical property, yet the more even distribution of ecclesiastical revenues which it has effected has told largely on the public usefulness of the Church as a whole. The Tithe Commutation Act of 1836 was another important parliamentary effort to reduce a long-standing grievance, and to remove something of the friction which could not but exist between a richly-endowed ecclesiastical organisation and such of the population—secular, indifferent, or hostile—as, by the terms on which they held their own property, were bound to support it. The history of the parliamentary reform of the Church of England in the present reign would properly cover that of all the Acts for improving the procedure of the Church Courts, transferring their jurisdiction in some cases to secular courts, facilitating

appeals to a Court partly secular and partly ecclesiastical,—that of the Judicial Committee of the Privy Council,—constructing new Courts, such as that created by the Public Worship Regulation Act of 1874 for the trial of special offences by the clergy in not 'conforming to the requirements of the Book of Common Prayer,' and controlling in certain respects the action of the clergy by a reorganisation of the parish vestry.

It is to be observed, however, that the legislative function of readjusting and controlling religious trusts has by no means been confined to the case of the Established Church. The circumstances of Nonconformist bodies are usually in their nature far simpler than those of the Established Church, and are such that the ordinary legal rules which govern voluntary associations and trade partnerships easily apply to them. When, in 1844, there was some fear, from decisions of the Court of Chancery and the House of Lords, that the endowments of one sect might be forfeited in favour of another, owing to some change or development of creed, the Dissenters' Chapels Act was passed,[1] which provided that, where the founder had not expressly defined the doctrines or form of worship to be observed, and therefore the character of the trust had to be gathered from extrinsic evidence outside the will or deed of the founder, the usage of twenty-five years should give trustees a title to their endowment. The operation of this Act was to establish harmony between sects which, from the near approach of their doctrinal standards, might be tempted to compete with one another

[1] 7 and 8 Vict. c. 45.

for endowments, the true purpose of which was, by uncertainty of evidence, lapse of time, and therewith change of circumstances, very indefinite. It became merely a matter of ordinary judicial evidence to ascertain whether, in any particular case, the broad scheme of doctrine professed by a sect had been continuous and uniform for the twenty-five years preceding. The general result of this legislation was, on the one hand, to secure the rights of private members of the sect to the property and religious services which the endowment conceded and provided for, and on the other hand, to enforce on the ministers and officers of the sect the duty of satisfying the expectations of its private members, in respect both of doctrine and ritual.

In thus noticing the recent policy in reference to the Church of England and sectarian bodies, for the purpose of determining whether a new constitutional position has been taken up, it is not suggested that Parliament has complied with or adopted any abstract theory of the relations of Church and State. It would be more true to say that the new constitutional position is that of ignoring all obligation to favour any abstract theory whatever concerning religious affairs. Apart from the sentiments and predilections of particular members to be found in both Houses of Parliament, the broad sense and temper of Parliament as a body exhibits itself more and more in the direction of treating the Church of England and all other religious institutions as social facts which, whether beneficial or the contrary, transient or permanent, profoundly penetrate society, and require legislative as well as judicial vigilance to guard them against corruption and abuse. If it is true that, by its measures for the

increase of the episcopate and the like, Parliament interferes more directly with the Established Church than with other religious bodies, and the chief ministers of this Church are nominated by the Government of the day, this must be looked at, not as admitting any superior religious merit in the Established Church as contrasted with other bodies, but partly as due to accidental circumstances for which only an historical explanation can be found, and partly to the enormous amount of property, social influence, and private interests, involved in the government of the Church. Any other theory would be inconsistent with such facts as the very limited area of the Queen's dominions over which the English Church is legally established; the recent prompt disendowment and disestablishment of that Church in Ireland; the repeated modifications of the principle of establishment as applied to Presbyterianism in Scotland; and the very various and elastic policy in religious matters applied, as was noticed above, to the dependencies.

(2) The reform of educational endowments is closely connected with that of religious endowments, inasmuch as, at the time to which the most important endowments can be traced back, religious and educational objects were regarded as almost inseparable. It might hardly have been expected that the great Universities of the country would resent parliamentary inspection and control in the way they did; and had not their best friends in the House of Lords been more far-sighted than those on the spot, University endowments might have long remained centres of narrowness, inefficiency, and festering abuses, when all other similar institutions had been purged and vivified. It was

on the 23rd of April, 1850, that Mr. Heywood proposed in the House of Commons that an humble address should be presented to Her Majesty, praying her to issue a Royal Commission of Inquiry into the state of the Universities and Colleges of Oxford, Cambridge, and Dublin, with a view to assist in the adaptation of these important institutions to the requirements of modern times. In spite of the opposition of all the members for those Universities, Lord John Russell, then Prime Minister, announced that if Mr. Heywood would withdraw his motion, the Government would advise the Crown to issue a Royal Commission to inquire into the state of the Universities. On the 18th of the following July, Lord John Russell further explained the purpose of the Government by saying: 'We propose 'to make such inquiries as were made with respect to 'the municipal corporations and the ecclesiastical 'bodies; and if it should on inquiry be thought 'necessary that any alteration should be made, it will 'afterwards be the time to inquire what is the authority 'by which these alterations should be effected.' On this Commission,—which was furnished with very insufficient powers for the purpose,—proceeding with its work, the Vice-Chancellor of Oxford positively refused to give evidence, and the example was followed by many other office-bearers of the University and Colleges. Thus the revenues of the Colleges could not be even approximately calculated, and the result was in the highest degree unsatisfactory. It was not till 1854, under the Government of Lord Aberdeen, that, by overwhelming majorities in the House of Commons, and with the invaluable and indispensable support of the Earl of Derby in the House of Lords, an effective

measure was passed for the reform of the Universities. In the same year Commissioners were sent to Oxford, and two years later to Cambridge, in pursuance of the Act, and in order to give effect to its provisions. By this Act, conjointly with the University Tests Act of 1871, the Universities and Colleges, with all the offices appertaining to them, excepting a very few, such as some of the headships of Colleges and professorships of Divinity, were thrown open to all persons, irrespective of religious belief; the government of the Universities was transferred to a new and effective body elected by resident graduates; and steps were taken which have not yet been completed, to ascertain minutely, and to apply in the most beneficial directions for the promotion of popular education of the highest class, the revenues of the Universities and Colleges.

In the course of reconstructing educational endowments, Parliament has encountered almost more pertinacious resistance when endeavouring to scour and invigorate the vast number of endowed schools scattered throughout the country than even when grappling with the opposition presented in the great seats of learning. In the case of these schools personal and local interests had been found very strong for the purpose of preventing inquiry, impeding and delaying proposed changes, and at length curtailing and dwarfing the schemes for change in such a way as to reduce the benefits of parliamentary interference to the smallest possible point. At the same time, it was not possible to arouse the interest of the public and affect its imagination in the case of innumerable institutions of somewhat insignificant dimensions, in the same way in which it was possible to generate a public concern for University

reform. Nevertheless, Parliament neither shrank from the task nor has had any contemptible degree of success in accomplishing it, so far as it has yet advanced. The same method was in principle followed as had been pursued in the instance of previous comprehensive reforms of a similar sort. A Schools Inquiry Commission was first appointed, upon an elaborate Report of which Commission the Endowed Schools Act of 1869 was based. Fresh Commissioners were appointed under this Act for the purpose of applying the reforms contemplated by it to the circumstances of all the schools which were comprised in the original Commission. Schemes for the reconstruction of these schools were to be prepared, and to become law on their having lain for a definite period on the tables of both Houses of Parliament without being objected to by either House. The main difficulty experienced in the preparation and enforcement of these schemes has been due to a competition between the alleged claims—for which the language of the trust afforded sufficient colour—of a narrow body of local residents on the one hand, and those of the general population of the country on the other; and also between claims asserted on behalf of the poor on the sole ground of their poverty, and those of all children, whether technically 'poor' or not, whose proved industry or ability might best qualify them to draw advantage from the superior education which the schemes, for the first time after long years of apathetic depression, introduced. When the opponents of the schemes have been influential in Parliament,—as when the Corporation of London used all their forces in both Houses of Parliament to maintain their patronage and to uphold obsolete institutions menaced by schemes for

the reconstruction of endowed schools in the metropolis, —the opposition has been found irresistible, and the reform has been proportionately incomplete. Nevertheless, considering how large a number of such schemes have been actually prepared and carried, and that one fixed principle maintained by the Act is that nothing but the express language of the trust can raise a presumption in favour of the Church of England as against all other religious bodies,—and that the utmost provision is made in fact by the Commissioners for securing an ever-renewed governing body, elected by unimpeachable processes,—the reformation effected, though too scattered to be other than silent and obscure, is perhaps one of the greatest and most beneficent which Parliament has recently achieved. In no other case is there more unmistakably manifested the constitutional assumption that Parliament has a supreme right of abolishing what is noxious, re-creating what is perishable, and directing to novel ends what time has rendered obsolete in its older shape, in the very face of customs, however tenacious, and of the express language of founders, however emphatic.

(3) The reform of so-called 'charitable institutions,' though not met at any point by organised opposition, has perhaps tested more severely than that of religious endowments the constitutional principle that Parliament is the supreme guardian, administrator, and judge in the case of property entrusted to the good faith of the State for carrying out from generation to generation certain specific ends pointed out, in accordance with law, by testators and donors. Where religion or education was the avowed object, the general ends were sufficiently conspicuous to supersede all controversy on

this point. But the word 'charity' not only meant in the intention of grantors, but was interpreted by Courts of Justice to mean, almost every sort of object, however eccentric and even extravagant, which could not be readily classed under a more definite term. The superstitious terrors, and piety as recognised by the orthodox standard of the day, no less than a genuine benevolence acting in accordance with fallacious economic theories, all co-operated to put in trust a vast amount of property which was thereby withdrawn from general circulation, managed by persons mostly obscure and practically irresponsible, and often not only wasted but employed for ends which sound economic theories condemned as fostering pauperism, impairing the national energy, and in fact conflicting with all the latest enterprises for social improvement. The Court of Chancery, acting not only in the name of the King as *parens patriæ*, but in accordance with the statute of the 43rd of Elizabeth, chapter 4, has from time immemorial assumed and exercised a valuable jurisdiction in inquiring into abuses of charitable donations, and in applying such remedies as a Court of Justice could apply. Additional facilities for inviting the interference of Courts of Equity, especially with respect to the management of estates belonging to charities, were afforded by later statutes.[1] The chief legislative effort, however, of modern times, concerning charities, is the Charitable Trusts Act of 1853. Under this Act a permanent board of Commissioners were appointed (called the Charity Commissioners for England and Wales), who were empowered to inquire into the condition and

[1] 59 Geo. III. c. 81; 2 Will. IV. c. 57; 3 and 4 Vict. c. 77.

management of all charities whatever, with two or three exceptions, and for that purpose to require accounts, and to appoint inspectors who should have power to examine witnesses on oath. The Board were empowered to assist with their opinion or advice persons concerned in the management of charities, and no legal proceedings could be taken except upon a certificate of the Board. An annual Report of the proceedings of the Board was to be laid before Parliament. The operation of this Statute, and of the Endowed Schools Act of 1869,—a clause of which empowered the Commissioners to convert small doles and insignificant local charities to educational uses,—has undoubtedly gone far to arrest existing abuses and to prevent their further spread. Nevertheless, it is to be remembered that, while Parliament has in this legislation assumed the constitutional right to intervene, the success of the intervention must depend on the effective working of the machinery employed. The function of appointing the Charity Commissioners,—on whom has lately been also cast the work at first entrusted to the Endowed Schools Commissioners,—is an executive one, and like all other executive functions, must depend, for its honest discharge, on the sedulous attention of Parliament. When the appointment is completed, it must still rest largely with Parliament to secure diligence and impartiality on the part of the Commissioners. There is no part of the mechanism of the State in which indolence and oversights are likely to grow with greater ease, nor any part in which the result of such indolence and oversights is likely to be more replete with moral and economical injury to the population.

(4) The history of the reform of municipal corpora-

tions is in fact that of the Municipal Corporations Act of 1835. Since the passing of that Act, no measure of anything like equal proportions has either supplemented or modified it. The City of London has succeeded in escaping any comprehensive legislative interference; and the chief measures, passed or promised only, have for their purpose the extension of the Act of 1835 to a greater number of boroughs than the 178 on which it was originally imposed, and those which have since voluntarily accepted it. In order to understand the real spirit of the legislation of 1835, as distinguished from the details of the reforms effected, it is worth while making a quotation from the Report, published in 1835, of the Corporation Commissioners. They said: 'We report to your Majesty that there 'prevails among the inhabitants of a great majority of 'the incorporated towns a general, and in our opinion 'a just, dissatisfaction with their municipal institutions, 'a distrust of the self-elected municipal councils, 'whose powers are subjected to no popular control, and 'whose acts and proceedings, being secret, are un-'checked by the influence of public opinion; a dis-'trust of the municipal magistracy, tainting with 'suspicion the local administration of justice, and often 'accompanied with contempt of the persons by whom 'the law is administered; a discontent under the 'burdens of local taxation, while revenues that ought 'to be applied for the public advantage are diverted 'from their legitimate use, and are sometimes waste-'fully bestowed for the benefit of individuals, sometimes 'squandered for purposes injurious to the character and 'morals of the people. We therefore feel it to be our 'duty to represent to your Majesty that the existing

'municipal corporations of England and Wales neither 'possess nor deserve the confidence and respect of your 'Majesty's subjects; and that a thorough reform must 'be effected before they can become what we humbly 'submit to your Majesty they ought to be, useful and 'efficient instruments of local government.'

The actual reforms effected belong rather to the recent history of local government than to the general constitutional principle, which is the only matter of inquiry here, that Parliament has emphatically assumed to itself the right of introducing into municipal bodies any amount of change which may seem needed to make them really efficacious for public ends. It is sufficient to say that by the Act uniformity and certainty were secured; the municipal constituency,—since made to include women,—was established on a well-recognised basis of rating and residence; the government of the boroughs was vested in bodies elected on a popular principle, and yet so as to avoid the opposite dangers of perpetuity and of capricious and incessant change. The collective population originally affected by the Act was two millions.

3. It might be doubted how far movements in the policy of the country in reference to trade, industry, and social economy properly belong to a consideration of constitutional movements. But when it is remembered that parliamentary interference, for whatever ends, with the free action of citizens in the accumulation and distribution of moneyed capital, and in the processes of organising themselves for the purpose of combined commercial speculations or industrial work, forms a recognised branch of legislation, it is seen at once that the nature and limits of this interference

must be determined by some general principles which are in the truest sense constitutional. A line of demarcation has to be drawn between the presumptive claims of individual liberty, of immediate public utility, as scientifically ascertained or believed to be ascertained, and of broader and more general principles of government which cannot be long outraged with impunity. The history of the English Parliament is replete with measures of interference with the economic activity of individual citizens now either tacitly grown obsolete or scientifically condemned. There are found, too, influential schools of political thought of recent growth which would banish the interposition of the State from every field of industrial activity, except in cases such as that of railways, where the essence of the enterprise involves something of the nature of a confiscation, which can only be effected by law. Whatever theories are really in the ascendant in the world of thought, and may ultimately prevail in practice, the only point of constitutional relevancy is that during the last half-century, and mainly through the instrumentality of Sir Robert Peel and his political successors, the interference of the State with trade, commerce, money, and social economy generally has been professedly directed in accordance, not with the routine established by long-familiar custom, nor with the dictates of an immediate expediency, however urgent, nor with the promptings of self-interest discoverable in important classes of the community, but with abstract principles of economy and of government, first laid down by thinkers outside Parliament, and then argumentatively reasoned out and successfully supported within its walls. The proof of these propositions is to be seen in the recent action

of Parliament in reference to (1) the Bank of England and other banks, (2) public Companies, (3) railways, (4) factory legislation, (5) the National Debt, and taxation.

(1) The modern legislation relating to the Bank of England commences with Lord Althorpe's Act of 1833,[1] by which the Bank of England was confirmed in the enjoyment of all its existing privileges until 1855, with the proviso that before the expiration of the term so fixed, and after ten years from the date of the Act, the privileges should cease, on a year's notice being given; 'and any vote or resolution of the House of Commons 'signified by the Speaker of the said House in writing 'and delivered at the public office of the said Governor 'and Company [of the Bank of England] or their suc- 'cessors should be deemed and adjudged to be a 'sufficient notice.' It was in reliance on this clause that, on May 6, 1844, Sir Robert Peel proposed the revision of the Bank Charter, and introduced the measure afterwards known as the Bank Charter Act, which has, for better or worse, revolutionised the relations of Parliament and the Government of the day with the trading community at large. The magnitude and novelty of the enterprise may be gathered from the language of Sir Robert Peel in first broaching the subject in the House. He said: 'I shall proceed at once to 'call the attention of the House to a matter which 'enters into every transaction of which money forms 'a part. There is no contract, public or private,—no 'engagement, national or individual,—which is un- 'affected by it. The enterprises of commerce, the 'profits of trade, the arrangements made in all the

[1] 3 and 4 William IV. cap. 98.

'domestic relations of society, the wages of labour, 'pecuniary transactions of the highest amount and of 'the lowest, the payment of the national debt, the pro- 'vision for the national expenditure, the command which 'the coin of the smallest denomination has over all the 'necessaries of life, are all affected by the decision to 'which we may come on that great question which I 'am about to submit to the consideration of the House.' The political principles which governed this reform, and which may be taken as the key-note of all the monetary reforms since effected, are brought into view in the following passage of the same speech. 'I have now 'to state the extent to which I propose to carry out 'these principles. [That is, the principles respecting 'the measure of value, coinage and currency, and pro- 'missory notes payable on demand.] If I do not carry 'them out immediately to their full and entire extent, 'I may be told, as I have been told before, that very 'good principles have been laid down in the abstract, 'but that practically I shrink from their application. 'Nevertheless, the opinion which I formerly expressed 'I still entertain—that it is of great importance that 'public men should acknowledge the great principles 'by which important measures should be regulated; 'and in discussing a question of such magnitude as the 'present, I had rather it were said, "You fall short in '"the application of sound and admitted principles," 'than that, "You have concealed or perverted those '"principles for the purpose of justifying your limited '"application of them." . . . . All I can promise is, 'that I will propose no practical measure which is in- 'consistent with the principles that I have laid down, 'and which does not tend to their ultimate establish-

'ment. It is, however, most important that those who 'are responsible for the management of the affairs of 'a great country like this—seeing how easy it is, by 'unwise legislation, to create panic or introduce con- 'fusion into the monetary transactions of the country '—it is most important that they should deal con- 'siderately with private interests; first, because justice 'requires it; and secondly, because there is danger 'that the cause of progressive amendment will be in- 'jured if you cannot reconcile reform with a due regard 'to the happiness and welfare of individuals.'

It is not the purpose here to explain or criticise the provisions of this celebrated Act from a financial point of view. It is sufficient to notice that the effect of the Act was to render the Bank of England far more a department of the State than it had ever been before. The State, in fact, by this Act assumed the responsibility of securing the convertibility into coin of notes issued by the Bank, and the machinery introduced by the Act was a device, more or less wisely and aptly constructed, for the achievement of this end. Instead of being, as it had been hitherto, a mere private corporation, which in return for loans to the State, and for its services as agent in the management of the National Debt, had certain definite and peculiar privileges conceded to it, the Bank was transformed into a public institution, having supreme control over the issue of notes and the coining of money—the limits, the modes, and the occasions of such issue and coinage being strictly defined by Act of Parliament, and conceived in the interests, not of the shareholders of the Bank, but of the public at large, or rrəqɹɐ of the State as an organised whole.

The privileges and responsibilities conferred by the Bank Charter Act on the Bank of England necessarily involved a reconsideration and readjustment of the rights and duties of all the other banks in the country; and the Bank Charter Act itself, and later Acts, contain numerous provisions for reconciling the vested interests of banks existing at the time of the passing of the Bank Charter Act with the new position of the Bank of England, for facilitating the multiplication of banks which should not interfere with the operations of the Bank of England, and for protecting the public against an unlimited diffusion of responsibility without sufficient guarantees, while on the other hand permitting an unlimited increase in the number of partners, under legally prescribed conditions of liability towards the customers of the bank. There is no doubt that much of this legislation has proceeded in too hap-hazard a way, and has been much perplexed by the incongruous state of things already existing in 1844. The whole subject has been repeatedly brought before Select Committees of the House of Commons, and more systematic legislation than heretofore is likely to characterise the future. What is of chief importance to notice is, that from 1844 the public policy towards banking has been one of well-studied economic principle, and not of pedantic sciolism or of mere deference to existing interests or to the call of a transient emergency.

(2) The principles involved in the recent policy of Parliament in reference to Public Companies are not identical with those involved in the Bank legislation just referred to, though in some points they cover the same field. The older policy of the country in reference to trade associations of all sorts was that of jealousy

and restriction. Beyond the cumbrous, technical, and confined mechanism of a legal partnership, and the alternative resource of incorporation at the arbitrary will of the Government, no opportunity was afforded for a combination of efforts among a variety of persons, though directed to ends however presumably beneficial. The Act of 1834,[1] based upon the Act of 1825, for the first time introduced a more elastic machinery of association than any previously known, though the accordance of it in any given case depended on the will of the Crown. The Act of 1834 enabled the Crown to grant, by letters-patent, 'to any company or body of 'persons associated together for any trading, charitable, 'literary, or other purposes, and to the heirs, executors, 'administrators, and assigns of any such persons, 'although not incorporated by such letters-patent, any 'privilege or privileges which, according to the rules of 'the common law, or in pursuance of the said recited Act, '[that of 1825, enabling the Crown to grant charters of 'incorporation with individual liability] it would be com-'petent to His Majesty, his heirs and successors, to grant 'to any such company or body of persons in and by any 'charter of incorporation.' It was in 1844, when the insufficiencies of the Statute on the one hand, and of the administrative powers possessed by Courts of Law or of Equity on the other, for the purpose of facilitating co-operative trade and industry became apparent, that the Legislature first passed an Act for the registration, incorporation, and regulation of joint-stock Companies. The Joint Stock Companies Act of 1856 carried into effect the principle of limited liability, and not only facilitated the

[1] 4 and 5 Will. IV. cap. 94. 6 Geo. IV cap. 91.

formation of corporate Companies by any seven or more persons with or without limited liability, but provided for the interests of the public, so far as notoriety was concerned, and for the interests of shareholders and of creditors. The general policy of Parliament is, however, most strongly marked by the Act of 1862.[1] It is entitled 'An Act for the Incorporation, Regulation, and 'Winding-up of Trading Companies and other Associa-'tions,' and is briefly cited as 'The Companies Act, '1862.' It repeals almost all the former Acts on the subject, and is a short code in itself. It affords the utmost facility for the constitution of joint-stock Companies, and, by help of the mere formalities of a 'Memorandum of Association' declaring the name, objects, capital, and subscribing members of the proposed Company,—and, in certain cases, of 'Articles of 'Association' in addition, prescribing regulations for the Company,—converts the Company into a corporation with far more adequate provisions for its judicial supervision and administration, as well as for its 'winding-'up,' than any other species of corporation had before possessed. The later Acts have in fact been no more than amendments and amplifications of this leading measure, or have applied it with some special provisions to Companies such as Gas and Public Lighting Companies, Railway Companies, Submarine Telegraph Companies, and generally those in which the citizens of a town or the public generally have some exceptional concern. Thus the constitutional attitude indicated by this whole class of legislation is that of affording practically unlimited facilities for industrial and commercial com-

[1] 25 and 26 Vict. cap. 89.

binations, while interposing (though most inefficiently at present) the arm of the State to protect the general public against imposture, the shareholders against the consequences of involuntary ignorance, and creditors against the fraud or accidents from which their own vigilance can only imperfectly defend them.

(3) Closely akin to the principles of legislation recently assumed in the case of public Companies, are those which have been progressively elaborated for the case of railway construction and management. Soon after the first infection of what is now historically known as the railway mania, and before many of the innumerable projects had actually been brought into working order, Sir Robert Peel's Government interposed, in 1844, and introduced the Railway Act of that year, upon which all the later Parliamentary policy in this respect has been founded. The part of the Act, indeed, which provided that if within a certain fixed time the profits of any railway were found permanently to exceed ten per cent., the Lords of the Treasury might, on guaranteeing for a time ten per cent. profit, reduce fares in the interest of the public, and which secured to Government the option of purchasing, under certain circumstances, and by an Act of Parliament to be obtained for the purpose, railways yet to be constructed, has been rendered abortive, partly through the sanguine expectations of that day not being fulfilled, and partly through the policy of Government interference with locomotive enterprises being a matter of unsettled controversy. But the real importance of the Act of 1844 was that it expressed or inaugurated the constitutional position, that the poorest and most dependent citizen has a claim not only to have his vested rights of free

and cheap locomotion along the Queen's highroads, or such substitutes for them as the Legislature may from time to time introduce, protected by Parliament, but to share, in some proportionate though perhaps indefinite measure, in the advantages of cheapness, rapidity, ease, and safety which the progress of invention and the support of Parliament combined enable railway companies to achieve. The supervision of the Board of Trade, provided for by the Act of 1844, and since supplemented by the facile judicial mechanism of the Railway Commission, of itself emphasizes the direct and continuous concern of the State in railway management. The provisions contained in the original Act, and in later amending Acts, for cheap Parliamentary trains with third-class carriages covered from the weather, and stopping at convenient places, and for the limitation of the amount of third-class fares, quite as much as the legislative provision for the conveyance of the mails and of military and police forces at certain charges, and for the construction of electric telegraphs under fixed conditions, establish that railway administration is becoming more and more, in fact if not in name, a department of the State, the conduct of which is distributed between State officials and a certain number of private persons, who voluntarily submit themselves to the conditions imposed by law, for the recompense of being admitted to enjoy the speculative advantages of the enterprise. The later policy of Parliament in taking to itself, in the hands of the Government of the day, the entire management of the electric telegraph communication, is a development of the same principle which some persons would note as a hazardous decline towards centralisation. But in truth, the constitutional mean-

ing of the principle involved in all these cases is, that in the great rush of modern inventions and speculative enterprise, the ambition and avarice of special classes of society are likely to have, especially at the outset of a novel enterprise, enormous advantages when brought into competition with the silent and obscure claims of the more dependent classes of the community generally. In such cases the only existing and the only competent friend of the over-ridden weak, and of the neglected poor, is the State, as personated at the time by Parliament. By their laboriously devised and, it may truly be said, laboriously worked machinery of Select Committees, both Houses of Parliament show that they are true to their function of protecting those who cannot protect themselves, not only on the occasion of new railway schemes being propounded, but on any allegation being made of grievances inflicted by existing railway companies. The task engaged in by these Committees was at one time so ponderous as to threaten to absorb the bulk of the time at the disposal of members; and in spite of the disproportionate amount of representation which the Directorate of railways still secures in the House of Commons, it is to the credit of that House that its responsibilities towards the public in respect of checking, supervising, and controlling new and old companies, are unflinchingly recognised.

(4) The principle of Government interference on behalf of dependent classes of the community, and in the case of industrial enterprises of a constantly increasing magnitude and public importance, is further illustrated by the history of factory legislation, from the Bills and Acts of 1843–45, to Mr. Cross's Consolidation and Amending Act relating to 'factories and workshops'

in 1878. The policy of factory legislation, and of the analogous legislation as applied to workshops, and to some extent to agricultural labour, has contemplated several objects, distinct from one another, and of very different degrees of public utility. The original aims of this legislation seem to have been two; that of getting rid of the brutality which attended the employment of women and children in industrial occupations believed to be unsuited for them, as exhibited in the Mines and Collieries Act of 1842; and that of providing for the religious and moral education of the young, as exhibited in Lord Ashley's motion, on the 28th of February, 1843, for an address to the Queen in reference to the subject. But as the policy of protecting women and children became more familiar, and its superficial benefits more conspicuous, Parliament has not taken its stand at the point at which brutality and total educational neglect commence, but has repeatedly endeavoured so to supervise the labour of operatives, especially of women, as to substitute a rigid rule for the flexible arrangements of private contract, thereby driving women away from what in the multitude of cases might be harmless and economically advantageous fields of labour, with the remoter consequence of thinning the labour market, raising prices, and expelling a variety of manufactures to other countries. The subject, of course, is not without its perplexities, and appeals, on the face of it, to a short-sighted and superficial philanthropy. It is thus that Miss Martineau[1] characterises the political shortcomings, while explaining the immediate objects, of the system of factory laws.

[1] *History of the Peace.* Bk. vi. chap. vii.

'As for the factory legislation, it is almost as me-
'lancholy to witness the efforts made to cure the evils
'of our over-wrought competitive system as to con-
'template the evils themselves. First, we have allowed
'our operative population to grow up, in less ignorance
'than some other classes, it is true, but with a wholly
'insufficient knowledge of their own condition and lia-
'bilities. They have overcrowded the labour-market,
'so as to be compelled to work harder, not than other
'classes of labourers who earn smaller wages, but than
'is good for anybody to labour; and then we try to
'mend the matter by forbidding them to sell more
'than a given amount of their labour. It is not thus
'that the excessive competition which is the cause of
'the mischief can be reduced; and the true friends of
'the working freeman felt that he lost nothing, while
'he retained his liberty, by the failure of Lord Ashley's
'ten-hour measures of 1844.'

Though of late years growing scruples have been felt, and represented in Parliament in speeches and petitions, about the policy of pressing forward the factory-law system, especially as directed to the restriction of women and of children a little below the limiting age, the latest legislation on the subject seems to show that no practical change is yet contemplated; and the whole of this class of legislation proves that Parliament still claims a constitutional competence to revert, if need were, to as disastrous an interference with private industry and trade as that of which the legislation of the early Edwards was a flagrant and hortatory instance.

(5) The policy and constitutional attitude of Parliament affects the social economy of the country in no

way more directly than in the resources which are employed for the several purposes of (i) reducing the national debt, (ii) adding to that debt, (iii) devising modes of collecting revenue for the payment of interest on the debt, or for extinguishing the capital.

So far as the treatment of the debt itself is concerned, the policy is either of a chronic and continuous kind, or of an accidental and intermittent kind. The former belongs to times of peace, prosperity, and public contentment generally; the latter to critical and transient emergencies, due to war or the apprehension of war, or to famines or like calamities at home or in the dependencies. It is now a pretty well recognised doctrine that, while on the one hand it is inexpedient to make extravagant and expensive efforts to make any signal reduction of the debt, which was contracted on far easier terms than any money could now be borrowed for liquidating it, yet on the other hand, by the joint methods of applying surplus income and creating terminable annuities, a gradual process of reduction should always be going on. In the case of a special emergency, for which funds in excess of the average annual revenue are needed, and needed at once, a question is always propounded as to whether it is more just and expedient to raise the money by extra taxation,—or, as it is called, within the year,—or to create a fresh loan which involves an addition to the public debt, the burden of which is shared by posterity. There is a dangerous proclivity on the part of Governments,—especially manifested in the circumstances of the intervention of England in the settlement of the affairs of the Turkish provinces in 1876–78, and generally noticeable in the conduct of military expeditions on the

outlying frontiers of remote dependencies,—to shroud from the country the fact of the expenditure incurred, by adding to debt in the place of increasing taxation. The inquiry how far the cost of a political movement is properly to be shared by posterity, on the ground of the permanent advantages supposed to be reaped by it, is not a very profitable one, inasmuch as any movement on behalf of national defence, national duty, or national enrichment, must be presumably beneficial to the State as an immortal organisation, if it can be justified at all. The better doctrine now recognised, in spite of temporary governmental divergencies and eccentricities, is that each generation knows its own capacity for meeting an emergency, but does not know whether a discontinuance of national prosperity, or the appearance of fresh phenomena wholly unimagined at present, may not place future generations in a very different position with respect to bearing the burden of debt. Thus it seems to be getting admitted as a constitutional maxim, that the presumptive duty of a Government is to meet all current necessities by an increase of taxation, or by short loans the repayment of which is to be distributed over a very limited number of years. Any exception to this can only be justified by reasons of the most special and convincing sort.

With respect to the principles now recognised as applicable to the raising of revenue, the discussion is in most of its aspects an economical rather than a constitutional one. The chief mark, however, of the present era is that purely economical considerations have been allowed a weight, and have been extended over an area, wholly unknown in former times. The passing of the Act for the repeal of the Corn Laws in 1846,—the

Budget of 1860, which included the provisions for the Commercial Treaty with France, and thereby inaugurated a policy, since largely developed, of international commercial freedom,—and the gradual abolition of innumerable minute taxes, at once vexatious, expensive, and as often as not economically vicious,—are all signs that Parliament has learnt to regard taxation as a purely economical and not as an indirectly political instrument, and that it no longer aims at achieving sinister ends for the advantage of special classes instead of diffusing the loss and the gain as impartially as possible among all. The main controversy which is still an outstanding one relates to the superior merit of direct or of indirect taxation, or of a system compounded of both; and, in the case of indirect taxation, to the special vices and virtues of the income-tax. But in the discussion of these great questions no fixed antipathy or prejudice is allowed to block the way. Parliament has vindicated its constitutional ability to collect money for the service of the State from any quarters, by any methods, and in accordance with any principles, it may from time to time approve.

In this review of the novel constitutional attitude of Parliament in respect to industry and social economy, the selection of topics has been perforce somewhat arbitrary, and much legislation of the highest degree of importance as bearing on the social and economical development of the people has not been adverted to. To such legislation belong the topics of national education, the reform of the judicature, the introduction of county courts, the abolition of imprisonment for debt, the reform of the bankruptcy and insolvency system, the regulations affecting merchant shipping in the interests

of traders, sailors, and the public, and, last of all, the attempts, more or less successful and systematic, to codify the Common and the Statute Law. An allusion to such topics as these is sufficient here, in view of the expansive treatment given to the subjects which have been selected as characteristic instances. So far as the Constitution is concerned, the principles which have determined Parliamentary action have been practically uniform. The obligation of recognising established economical theories, of reconciling the claims of the poor and dependent with the interests of the influential capitalist, and of abstaining from such interference as is prompted only by a regard for the advantage of special classes of society, seems to have been fully recognised in the course of this legislation. Where it has not been recognised at the time, later amending statutes have admitted the defect, and shown the true intention of Parliament to be in conformity with the principles of the Constitution as now apprehended.

4. There are some persons who, with an historical taste, and not without a romantic sensibility to the picturesque and antique, are disposed to find the centre of gravity of the British Constitution rather in the Parish, the County, and the Borough,[1] than in Parliament. These persons not only cleave affectionately to all that is still alive in institutions which at one time were the main agencies of Government, so far as it directly affected the life and happiness of the people, but are not without regret at the passing away of the most fossilised portions of those institutions, and at the gradual absorption of all local machinery for government in the common and

[1] See Mr. Toulmin Smith's *The Parish*, and Gneist's *Self-Government in England*.

uniform organ of Parliament. In spite, however, of the fears, regrets, or hopes of this or that section of the community, there is no doubt that the last fifty years have been witnessing an almost startling transmutation of what are often regarded, especially on the Continent, as the most characteristic features of English political existence. The change is not denoted in any sweeping attempt to substitute a centralised for a localised system of government; and any description of the process which has been at work based on the familiar theoretical opposition of central to local government would be misleading and superficial. It is true that there is scarcely a single instrument of local government which has not been of late touched and recast by Parliament; and no doubt a casual observer, mentally preoccupied with analogies and theories to be found anywhere, would at once descry in most of the changes effected a determined and hazardous passage towards centralisation of the most pronounced type.[1] But there are two sorts of

[1] Mr. John Austin's article on Centralisation, in the *Edinburgh Review* for January 1847, may be consulted for the purpose of clearing the mind from the obscurities and confusion with which current popular treatises and newspaper articles are replete on this subject. Mr. Austin, *more suo*, analyses with surpassing acuteness the rival views and theories prevalent in this country and on the Continent, and weighs in golden scales the exact amount of use and abuse to which centralised institutions are open. He exposes the fallacy which underlies the very term Self-Government, evaluates the worth of paid and unpaid functionaries generally, and adverts to the consequences of a multiplication of functionaries. His suggestions as to improved machinery for relieving the House of Commons from some of its self-imposed burdens, especially in respect of the preparation for private bills and the detailed task of criticising the language of all bills in Committee after the second reading, are worthy of all attention. Mr. Austin is especially at pains to distinguish between centralisation and over-government, on which

centralisation,—one, that of structure or mechanism,—the other that of spirit and intention. The centralisation of mechanism implies in itself nothing more than (1) the possession in the hands of a central authority of all the skeins, perhaps tangled and intricate, of the work which is being conducted by innumerable subordinate authorities throughout the country, (2) an incessant contact with all these authorities through the medium of reports and reciprocal communications, and (3) a faculty, whether exercised or not, of controlling or flexibly modifying, to the minutest point of refinement, the action of the authorities dependent upon it. A spirit of centralisation is manifested in the actual exercise of such a faculty for the purpose either of producing absolute uniformity, or of over-riding local opinion and choice in a measure which, in the view of those who dislike centralisation, exceeds what is imperatively required by the common interests of the country. The latter sort of centralisation may or may not be good, according to the matters with which it is concerned, or the times and places of its existence. The other sort of centralisation, that of easy and orderly mechanism, is always good everywhere, and implies nothing more than the utmost economy of expense, labour, and practical knowledge, with enlarged opportunities of homogeneous improvement. Probably the utmost perfection of political efficiency would be attained where mechanical centralisation was developed to the utmost possible extent, and where the centralisation which relates to the spirit and essence of government

last-mentioned topic his remarks are of considerable weight, and may be compared with the well-known views of Mr. Herbert Spencer in his *Social Statics* and scattered political essays.

was applied on such occasions, and no others, on which it might seem probable that the general advantages of uniformity, and of direction by a peculiarly competent though remote authority, would exceed the advantages due to the local energy and constant personal insight which are called into existence in self-contained and self-reliant institutions on a sufficient popular basis.

It is impossible not to see that, in the actual changes respecting local government which have been of late years effected by Parliament, a genuine effort has been made to avoid a needless substitution of central authority for the older and, on the face of them, more popular local councils, and yet at the same time to ensure the reconciliation of the special advantages derivable from local enterprise, knowledge, interest, and concern for economy, with those other advantages in the way of superior force, technical knowledge, scientific and other appliances, as well as stringent supervision, which only Parliament, through its acting medium, the Executive Authority of the day, can command.

It is perhaps in the reconstitution of the Parish, looked at as an area of secular administration, that parliamentary activity in the laying down of new principles for determining the relations of local to central powers has most of all been displayed. The Poor-law of 1834,—which superseded a system of pauper relief and management which had existed without legal alteration from the time of the first parliamentary introduction of a parochial poor-relief system, in the forty-third year of the reign of Elizabeth,—was the earliest modern instance of an invasion of the integrity of the Parish, and of the superposition of a central control of parochial authorities. The earlier constitution of 'Select Vestries,' and the later

legislation for controlling, reforming, and multiplying[1] such vestries, did not involve any breach in the parochial system. The essence of the Poor-law of 1834 was contained in two leading provisions. The first of these placed the superintendence of the whole machinery for dispensing relief to the poor in the hands of a central body of three Commissioners, whose functions were afterwards, by the Act of 1847, transferred to the Poor-law Board, a committee of the Privy Council; and still later, in 1871, concentrated, with other analogous functions, in the hands of a similar committee, called the Local Government Board. The second of these provisions contemplated the combination of a number of parishes into a so-called Union, which henceforward, for all purposes but that of taxation, became the unit of area of Poor-law management. By the 26th section of the Act it was enacted: 'That it shall be lawful for the said Commis-'sioners, by order under their hands and seal, to declare 'so many parishes as they may think fit to be united 'for the administration of the laws for the relief of the 'poor, and such parishes shall thereupon be deemed a 'Union for such purpose, and thereupon the workhouse 'or workhouses of such parishes shall be for their com-'mon use.'

The general reform, as indicated in these distinct provisions, illustrates that attitude of Parliament towards the Parish which, in and through a mass of later legislation for the division, reconstruction, and combination of parishes for all manner of governmental purposes, has been persistently maintained. The attitude is that of recognising and using the Parish as an ex-

[1] See Mr. Sturges Bourne's Act in 1818, 58 Geo. III. cap. 69; and Sir John Hobhouse's Act in 1831, 1 and 2 Will. IV. cap. 60.

isting, well known, and thoroughly habituated organisation; but, in the case of the Parish being accidentally too small, too large, or otherwise unsuitable for the political end in view, of entertaining no scruple as to substituting a fresh unit of area, of which, however, the Parish itself is an essential constituent element. The attitude of Parliament is further denoted by the introduction of wholly new guarantees and precautions for the economic use of local funds, and the wise and generally uniform management of local affairs, so far as this can be secured without impairing responsibility on the spot, weakening local energy and interest, or needlessly disturbing local customs, not to say prejudices.

Another point, closely related to the foregoing, though with different legislative results, is the modern reorganisation of the Police, or Parish, Municipal, and County Constabulary. The constitution of what is now known as the Metropolitan Police force, and the substitution in place of the older parochial police of a constabulary indefinite in point of numbers and wholly under the control of a Secretary of State, is perhaps, when thoroughly considered, the most decisive movement towards centralisation in all its senses,—and in some senses somewhat questionable,—which the present age has witnessed. The preamble of the Act of 1829 'for Improving the Police in and near the Metropolis,'[1] is worth citing as a constitutional land-mark. 'Whereas Offences against Property have of late in-'creased in and near the Metropolis; and the local Es-'tablishments of Nightly Watch and Nightly Police 'have been found inadequate to the Prevention and

[1] 10 Geo. IV. cap. 44.

'Detection of Crime, by reason of the frequent Unfit-
'ness of the Individuals employed, the Insufficiency of
'their Number, the limited Sphere of their Authority,
'and their want of Connection and Co-operation with
'each other: And whereas it is expedient to substitute
'a new and more efficient System of Police in lieu of
'such Establishments of Nightly Watch and Nightly
'Police, within the Limits hereinafter mentioned, and
'to constitute an office of Police, which, acting under
'the immediate Authority of One of His Majesty's
'Principal Secretaries of State, shall direct and control
'the whole of such new System of Police within those
'Limits: Be it enacted,' among other things, that
(Section 4) 'the whole of the City and Liberties of
'Westminster, and such of the Parishes, Townships,
'Precincts, and Places in the Counties of Middlesex,
'Surrey, and Kent as are enumerated in the Schedule
'to this Act, shall be constituted, for the Purposes of
'this Act, into One District, to be called "the Metro-
'"politan Police District;" and a sufficient Number
'of fit and able Men from Time to Time, by the Direc-
'tions of One of His Majesty's Principal Secretaries of
'State, shall be appointed as a Police Force for the
'whole of such District, who shall be sworn in by One
'of the said Justices to act as Constables for preserving
'the Peace, and preventing Robberies and other
'Felonies, and apprehending Offenders against the
'Peace; and the Men so sworn shall, not only within
'the said District, but also within the Counties of
'Middlesex, Surrey, Hertford, Sussex, and Kent, and
'within all Liberties therein, have all such Powers,
'Authorities, Privileges, and Advantages, and be liable
'to all such Duties and Responsibilities, as any Con-

'stable duly appointed now has or hereafter may have 'within his Constablewick by virtue of the Common 'Law of this Realm, or of any Statutes made or to be 'made, and shall obey all such lawful Commands as 'they may from time to time receive, from any of the 'said Justices for conducting themselves in the Execution of their Office.' The later Act of 1839 and still more recent Acts have empowered 'Her Majesty, by 'the advice of Her Privy Council,' to vary or extend the boundary of the Police district within limits which from time to time have been fixed by the successive Statutes.

The relevancy of the change effected by the Metropolitan Police Act of 1829 can best be understood from the opposition which greeted it when first introduced by Sir Robert (then Mr.) Peel, the Home Secretary in the Duke of Wellington's Government. It was said that a military Cabinet desired to introduce into England the despotic police of the Continent, with their whole system of domestic espionage; and influential newspapers denounced the abolition of the ancient order of watchmen. M. Guizot relates how an address was presented to King George the Fourth, conjuring him to open his eyes, to call upon the name of the Lord, and to rally his people around him, for a plot had been formed to overthrow the House of Hanover, and to place the Duke of Wellington on the throne, by the assistance of the Irish Catholics who were to be enrolled in the Police.[1] Long experience has dispelled most of these constitutional alarms, and reconciled the public with an institution the perils of which are found to be, at the worst, limited, and which has hitherto

[1] Guizot's *Memoirs of Sir Robert Peel*, p. 45.

proved to be subject to the effective control of Parliament. Nevertheless, the Metropolitan Police Acts, by substituting an entirely new unit of area for the Parish, by inventing an unprecedented organisation of undefined extent, and placing the permanent management of this organisation in the hands of the Crown, constituted an era in the history of local government in this country. The process of superseding the old parish constable throughout the country by the introduction of a class of officials better paid, better educated, and better managed, and subject to a more central administrative authority than that of the local justices on the spot, has been carried on by a series of Acts, among which may be mentioned the Act of 1839, enabling the Justices of any county in Quarter Sessions to appoint a chief Constable, who, with the concurrence of two or more Justices, might appoint superintendents for different divisions of the county, and any number of petty constables to act under them; the Act of 1856, by which the establishment of a county police force was made obligatory in every county, and power was given to Her Majesty in Council to require the division of a county into police districts, and arrange the terms of consolidation of the police of a county and borough; and the Act of 1872, which provided that no parish constables should be henceforth appointed by any parish, unless the Court of Quarter Sessions should decide that such appointment was necessary, or unless the Vestries of the parish should resolve on the appointment.

In intimate connection with the parliamentary reconstitution of the Parish in respect of Poor-law relief and the police, are the strenuous efforts that of late

years have been made by Parliament to further, supervise, and economise local efforts for promoting those various and often incongruous objects now compendiously gathered up under the title of the Public Health. According to the language of a series of Acts of Parliament, from the Public Health Act of 1848 to that of 1875, Public Health includes public well-being, comfort, and even entertainment, inasmuch as these Acts contemplate the paving and lighting of streets, and the purchase and management of grounds of public recreation, no less than the abatement of nuisances, the utilisation of sewage, and the prevention of the spread of infectious diseases. The legal machinery resorted to in this legislation is closely analogous to that of the Poor-law system. The parish is taken as the unit of area for rating, but the district of management is not conterminous with it. A Local Board of Health could be appointed for the district, either on the petition of a certain portion of the ratepayers, or on the annual death-rate reaching a certain height; and by the later Acts the institution of Local Boards has been made more and more generally compulsory. The Local Board has been brought into close correspondence, first with the Central Board of Health, and, since 1871, with the Local Government Board, the consent of which Board is required to all the more important acts of the local authority. It is unfortunate that a number of objects closely akin to the heterogeneous objects already comprehended by the Public Health Acts have been simultaneously made the subject of distinct legislation of an analogous kind, which has resulted in the co-existence of a number of districts often complicated with each other, and destitute of all uniformity in respect of the

election of authorities, the principles of rating, and the mode of central supervision.[1] Sewers Acts, Land Drainage Acts, Highway Acts, and a variety of local Acts for the construction of town halls, lunatic asylums, prisons, industrial schools, and reformatories, are specimens of legislation which may be described as introducing new and special local authorities somewhere intermediate between the parish vestry and the Court of Quarter Sessions, inclining to the former so far as relates to rating and chargeability, to the latter so far as relates to constitution and management. In the case of corporate boroughs the usual practice has been to make the Town Council the Local Board for the purposes of the several Acts.

This subject leads directly to a consideration of the reform of county administration, so far as Parliament has of late taken upon itself to grapple with so arduous, and in many quarters so unpopular, an undertaking. It has often been noticed that the county rate imposed by Justices of the Peace at Quarter Sessions is the only instance in this country of taxation without a shadow of a representative character in the taxing authority. It is said that, inasmuch as the Justices are appointed by the Lord Chancellor on the nomination of the Lord Lieutenant of the county, the taxing authority is a mere branch of the central Executive. Seeing, however, that the appointment of Justices is limited by rating and residence, and the necessity of having the business of Petty Sessions in the different subdivisions of the county conducted by Justices in the neighbourhood, the checks on any overbearing pressure on the part of

[1] See Report of Select Committee of the House of Commons on Local Taxation.

the central Executive are so numerous and effective as scarcely to leave any ground of apprehension open on this score. Nevertheless, it is now well recognised that, apart from all fear of corruption or undue central pressure, divers constitutional advantages would follow from a reorganisation on a popular basis of the Court of Quarter Sessions, as an administrative if not as a judicial body. On the general principle all political parties seem to be agreed, as the proposed legislation on the subject clearly shows. The obstacles which impede progress seem to be rather due to the difficulty of drawing a line between the sort of business for which special qualifications—whether of rank, property, or knowledge—are required, and can be best tested by the central executive authority, and those other functions for the fit discharge of which public opinion can, by the medium of voting, supply sufficient guarantees. There seems to be no constitutional scruple felt in any quarter as to the right, plenary capacity, and duty of Parliament to readjust the Court of Quarter Sessions as freely as it is constantly readjusting all the other oldest and most familiar local councils anywhere to be found.

Precedents in proof of the competency of Parliament to invigorate, where necessary, both Quarter and Petty Sessions, even on their judicial side, are supplied by the class of legislation by which Police Magistrates are appointed for the metropolis and its suburbs, Stipendiary Magistrates are or may be appointed in certain populous places, and paid Chairmen of Quarter Sessions are or may be appointed in certain of the larger towns. The Act carried in 1877 by Mr. Cross for the abolition of the less-filled prisons throughout the country, and the concentration of prison management in the hands of

novel authorities under a more direct central control, are yet further indications of parliamentary determination to allow no deference to the most antique county usages to stand in the way of the public advantage and of general economy.

It is needless to refer again to the enactments and operation of the Municipal Corporations Act; and it would be superfluous to say much on Mr. Forster's comprehensive measure for combining local activity with central supervision in the matter of Public Education. The former of these measures was one rather of renovating what was on the eve of expiring than of novel construction. The latter measure marked the introduction of a wholly new policy, based upon the constitutional right of the State, thereby for the first time asserted, to intervene, whatever the cost, or whatever the mechanical pressure needed for the purpose, in order to vindicate the claims of the young to education, in the same way in which by the Poor-law system it had for centuries vindicated their claim to food and clothing. Whatever novelty there is in this great measure must be looked for rather in the combination of local and central machinery which it employed, than in any startling constitutional assumption. The assumption of constitutional right was really contained in all the previous assumptions on the part of Parliament to protect the young at the expense of negligent parents, of the parish, or of the State, as the case might be; and it needed only a larger and deeper view of all the issues at stake in the matter of public education, as compared with other ends habitually sought by far more decisive and even questionable parliamentary means, to bring it into clear light, and rank it in its true order of necessary sequence.

Section IV.—Government of Dependencies.

The constitutional history of British Dependencies may be compendiously described as that of a gradual transfer of the functions of government from the Crown, in the exercise of a well-recognised prerogative, to Parliament, either as exercising its governmental functions directly, or only as controlling those subordinate Legislatures in the Dependencies which have been created either directly by the Crown, or by competent local authorities, or by Parliament itself. In the case of Dependencies acquired by conquest or by cession in time of peace,—as well as in the anomalous case of British India, which owes its existence as a dependency to both these causes combined, in addition to the special circumstances of the trade settlements effected in accordance with Charters of Incorporation,—the claims of the Crown to institute a local Government, or to supervise the action of existing institutions, wholly apart from any immediate interference of Parliament, have been universally recognised and everywhere illustrated in practice. In the case of Dependencies which owe their existence to voluntary settlement,—or, as in the case of the 'plantations,' to voluntary settlement supported by Charters of Incorporation,—it would seem that the settlers have a claim either to have their local government expressed and limited by their charter, or else to share in the constitutional advantages of direct parliamentary government, to which, if they had continued at home, they would have retained their right. In the

case of those small Dependencies,—such as Gibraltar, Malta, Ascension Island, Hong Kong, and perhaps Heligoland,—which seem to be rather occupied for military, naval, or diplomatic purposes than for purposes of strictly colonial extension, the paramount authority of the Crown seems likely to continue for some time unassailed. In the case, however, of all the other classes of Dependencies in the aggregate, the period of history now under consideration will be memorable for an aggression in all directions of the action of the British Parliament. This action is conspicuous in the following forms:

1. The framing of local and representative institutions, or the confederation of previously isolated colonies for the purpose of obtaining more effective local government:

2. The bringing of Dependencies (such as British India and the Hudson's Bay territories) previously subject to some anomalous management due to historical causes, under the direct or indirect control of Parliament:

3. The passing of special Statutes binding on the persons resident in certain Dependencies, or on Government officials in those Dependencies;

4. The passing of Statutes applicable to the British Dominions generally, including all the Dependencies, or certain of them specially named:

5. The control of the Executive Government at home in their dealings with the Governors of Dependencies, and in their policy as to assenting or not assenting to Acts of local Legislatures.

1. The history of direct parliamentary interference with the government of the Colonies dates from what

is known as the Quebec Act of 1774, and was the direct consequence of the revolt of the North American Colonies, to the history of which struggle the modern constitutional relation of Parliament to the Dependencies is consequently affiliated. By the Quebec Act, the Canadian settlements on the banks of the St. Lawrence, which had hitherto been under military rule, were placed under the government of the Crown through the medium of a local Council, and a Colonial Secretary at home, then for the first time appointed. The existing French Land-Law and the Roman Catholic Church were permanently established. The statutory test which at that time excluded all Roman Catholics everywhere else in the British Dominions from all public offices was of course dispensed with. A third of the members of the Council were to be French Canadians. The next epoch is that of what is known as Mr. Pitt's Constitution Act of 1791, by which Canada was divided into two parts or provinces, with the Ottawa river for a boundary; each province having a Governor and an Executive Council appointed by the Crown, and also a Legislative Body consisting of two Houses, one appointed by the Crown and the other by means of popular representation. The political history of the two Canadas, troubled and sinuous as it has been, is chiefly interesting as explaining the connection between the legislation of 1791 and that of the Canadian Confederation Act of 1867,[1] which marks the next important epoch of parliamentary intervention in colonial government. The Confederation Act recites that 'the Provinces of Canada, Nova Scotia, and New Brunswick

[1] 30 Vict. cap. 3.

'have expressed their desire to be federally united into 'one Dominion under the Crown of the United King- 'dom of Great Britain and Ireland, with a Constitution 'similar in principle to that of the United Kingdom;' that 'such a Union would conduce to the welfare of 'the Provinces and promote the interests of the British 'Empire;' that 'on the establishment of the Union 'by authority of Parliament, it is expedient not only 'that the Constitution of the Legislative Authority in 'the Dominion be provided for, but also that the nature 'of the Executive Government therein be declared;' and that 'it is expedient that provision be made for 'the eventual admission into the Union of other parts 'of British North America;' and it goes on to enact that it should be lawful for the Queen in Council to 'declare by proclamation that on and after a day there- 'in appointed, not being more than six months after 'the passing of the Act, the Provinces of Canada, Nova 'Scotia, and New Brunswick should form and be one 'Dominion under the name of Canada; and on and 'after that day those three Provinces should form and 'be one Dominion under that name accordingly.' The Act creates an Executive Council, and a Parliament with two Houses, the Senate and the House of Commons, very much on the lines of the Constitution Act of 1791, but with the difference that both Houses of the Legisla- ture were to be representative bodies; and provides for the extension of the Confederation by a clause which enacts that 'it shall be lawful for the Queen, by and with 'the advice of Her Majesty's Most Honourable Privy 'Council, on addresses from the Houses of the Parliament 'of Canada, and from the Houses of the respective Legis- 'latures of the Colonies or Provinces of Newfoundland,

'Prince Edward Island, and British Columbia, to admit 'those Colonies or Provinces, or any of them, into the 'Union, and on address from the Houses of the Parlia 'ment of Canada to admit Rupert's Land and the North-'Western Territory, or either of them, into the Union, on 'such terms and conditions in each case as are in the ad-'dresses expressed and as the Queen thinks fit to approve, 'subject to the provisions of this Act; and that the 'provisions of any Order in Council in that behalf shall 'have effect as if they had been enacted by the Parlia-'ment of the United Kingdom of Great Britain and 'Ireland.' From the wording of the Act it would appear that the Act itself imposes no limitation whatever on the extent of the legislative power of the Canadian Parliament. The 'privileges, immunities, and powers 'to be held, enjoyed, and exercised by the Senate and 'by the House of Commons, and by the members there-'of respectively, are to be such as are from time to time 'defined by Act of the Parliament of Canada, but so 'that the same are never to exceed those at the passing 'of this Act held, enjoyed, and exercised by the Com-'mons House of Parliament of the United Kingdom of 'Great Britain and Ireland, and by the members there-'of.' (Sec. 18.)

The precedents of parliamentary intervention of the sort above described in reference to the Canadian settlements have been followed, with little constitutional variation, in the foundation and amendment of the numerous important Dependencies in Australia and South Africa. The policy of confederation, indeed, has, from a variety of extrinsic causes, not ripened so rapidly in Australia as in South Africa; but in the case of the South African Colonies Parliament has already provided,

by the Act of 1877,[1] 'for the Union under one Govern-
'ment of such of the South African Colonies and States
'as may agree thereto, and for the government of such
'Union.' This Confederation Act is distinguishable from the Canadian Confederation Act in that, instead of merely constituting a single Dominion to which new provinces may from time to time be admitted, it constructs an elaborate federal system, more after the fashion of the United States, with a Central Legislature and Local Legislatures, the respective functions of which are clearly assigned in the constituting Act. The Act recites that 'proposals have been made for uniting
'under one Government under the Crown of the United
'Kingdom of Great Britain and Ireland those colonies
'and states of South Africa which may voluntarily elect
'to enter into such Union;' that 'such Union would con-
'duce to the welfare of the said colonies and states, and
'promote the interests of the British Empire, and that
'it is expedient to make provision for any two or more
'of the said colonies or states to unite at such time as
'may be found convenient'; and that 'it is expedient
'to declare and define the general principles on which
'the constitution of the legislative authority and of the
'Executive Government in the Union may be estab-
'lished, and to enable the details of the said constitution
'and of the administrative establishments thereunder
'to be provided for, after the wishes and opinions of the
'said colonies and states with respect to such details
'have been duly represented to Her Majesty through
'their respective Legislatures.' The Legislative Authority of the Union, called 'the Union Parliament,' con-

[1] 40 and 41 Vict. cap. 47.

sists of a Legislative Council, the number and composition of which is to be determined by the Crown; and a House of Assembly of a representative character; it being provided that 'in the apportionment of members, 'and in the determination of the qualifications of 'electors and members, provision shall be made for the 'due representation of the natives in the Union Par- 'liament and in the Provincial Councils, in such manner 'as shall be deemed by Her Majesty to be without 'danger to the stability of the Government.' (Sec. 19.) The distribution of legislative powers between the Union Parliament and the Councils of the Provinces may be varied by any Order in Council issued in pursuance of a Section of the Act; and it is provided that nothing in the Act itself should be 'deemed to affect 'or limit in any way the power of the Queen, with the 'advice and consent of the Lords Spiritual and Tem- 'poral and the Commons of the United Kingdom of 'Great Britain and Ireland in Parliament assembled, 'to make any law relating to the Union.'

The process of legislating for Dependencies by the British Parliament is practically limited in two ways: 1st, by the prerogative of the Crown, and, 2nd, by the existence of constitutional government already conceded to a Colony. In the case of a conquered or ceded Colony, it is well known that the powers of the Crown are of the most extensive kind, with respect to determining what shall be the system of law under which the inhabitants shall live. But these powers, though extensive, are not absolute; and in the leading case of *Campbell v. Hall*,[1] Lord Mansfield decided that the Crown could

[1] 20 State Trials, 323.

not make any change in the laws contrary to fundamental principles, as by exempting an inhabitant from general laws of trade, or from the power of Parliament, or by giving him privileges exclusive of other subjects. Lord Mansfield went still further, and said that the power of the Crown to give a constitution to a conquered country was not exclusive of Parliament; that 'there could not exist any power in the King exclusive 'of Parliament;' and a country conquered by the British arms becomes a dominion of the King in right of his crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain.

In the case of Colonies acquired by occupancy and settlement the prerogative of the Crown is limited to the appointment of Governors, the erection of Courts of Justice, and the institution of representative Assemblies. In 1843 a Statute[1] was passed conferring legislative power on the Crown in the case of settlements on the Coast of Africa and the Falkland Islands. The Queen in Council was thereby empowered to establish laws, institutions, and ordinances, and all such Orders in Council were to be laid before Parliament. This Statute was in fact a recognition of the limits of the prerogative, and of the impotency of the Crown to dispense with the aid of Parliament in the case of Dependencies of the class legislated for.

A more difficult, because incessantly growing question, is that which relates to the competency of Parliament to withdraw or interfere with subordinate Legislatures already existing in a Dependency. The abstract legal right of parliamentary control to the fullest

[1] 6 and 7 Vict. cap. 13.

possible extent can hardly be denied as a legal proposition; and even in respect of the practically obsolete claim to tax the Colonies, Mr. Justice Blackburn said, in his charge to the Grand Jury on the trial of Governor Eyre in 1868: 'Although the general rule is that the 'legislative assembly has the sole right of imposing 'taxes on the colony, when the Imperial Legislature 'chooses to impose taxes, according to the rule of Eng-'lish law they have a right to do it.' Though the rule is that the Crown cannot by its prerogative withdraw a Constitution which in the exercise of its prerogative it has once conceded, yet it would be difficult to deny in theory that such a right of withdrawal is vested in Parliament. The right was certainly exercised in 1866, in the case of Jamaica, when a plenary power of amending and altering the Constitution was granted to the Crown by Statute.[1]

Nevertheless, in spite of the prevalence, in books, of these legal theories, they must be regarded as giving a very imperfect and inaccurate account of the true constitutional relation, at the present day, of the British Parliament to such Dependencies as have Constitutional Legislatures. In the first place, it is obvious that if this relation can be expressed in any precise form, that form must at least be considerably varied for the very various circumstances and degrees of advancement of the different communities considered. In the second place, it is plain that, as in the case of Jamaica, unforeseen circumstances might arise, in which the scandalous or feeble working of colonial institutions might bring about such perils, either to the community

[1] 29 Vict. cap. 12.

directly concerned, or to the British Dominions generally, as must properly call for the strenuous intervention of the British Parliament. In the third place, it would be regarded as a breach, not merely of political faith, but of the sort of constitutional understanding which is the basis of all good government everywhere, if such elaborate structures, legislative and administrative, as those which have grown up in the Australian, Canadian, and South African settlements, which have been fostered by Parliament at home, which have been progressively modified and adapted to local wants and instincts, and which have been built up in view of perpetuity, should be assaulted or even menaced by capricious interference at the hands of the parent State. In fact the mere statement of the hypothesis demonstrates its absurdity. Nevertheless, the limits of the right of interference, especially in the matter of exclusive laws of trade, must be a subject of constant political controversy; and though no constitutional principle can as yet be appealed to in the place of the bald legal doctrines of an older time, there is little doubt that a sense of right and of general expediency will, after many a controversy and even sharp struggle, find a solution of the problem.

The original formation and the recent history of the Constitution of the Colony of Victoria are so instructive in many points of view, as exhibiting in a sort of reflected picture both the essential characteristics of the English Constitution, and also the peculiar difficulties with which all Constitutions framed after the fashion of it may one day have to contend, that it is worth while giving some detailed account of the existing constitutional circumstances of that Colony.

The constitutional history of all the Australian Colonies begins with the general 'Act for the better Government 'of Her Majesty's Australian Colonies'[1] passed in the year 1850 by the Imperial Parliament of Great Britain. This Act created a Legislative Council, partly elected and partly nominated, for the Colony of Victoria, and gave power to this Council 'by any Act or Acts to alter 'the provisions or laws for the time being in force under 'the said Act,' or to establish in the said Colony in the place of itself 'a Council and a House of Representa-'tives, or other separate Legislative Houses, to consist 'respectively of such members, to be appointed or 'elected respectively by such persons, and in such 'manner, as by such Act or Acts should be determined, 'and to vest in such Council and House of Represen-'tatives, or other separate Legislative Houses, the 'powers and functions of the Legislative Council for 'which the same might be substituted.' In the year 1854 the Legislative Council of the Colony exercised the powers given it by the Imperial Act of 1850, and established in its own place a Legislative Council of thirty members, elected by constituencies having a high property qualification, and of which every member was also to have a high property qualification; and a Legislative Assembly of sixty members, having themselves a low property qualification, and elected by a constituency very slightly removed from one including all men who had been settled for the space of twelve months in the Colony. Six members of the Legislative Council were to retire every two years, so that a total change was to be effected in ten years; the Assembly

[1] 13 and 14 Vict. cap. 59.

was to be summoned for five years, though it might be dissolved sooner by the Governor. It was enacted that the Legislature of Victoria should be empowered 'by 'any Act or Acts to define the privileges, immunities, 'and powers to be held, enjoyed, and exercised by the 'Council and Assembly, and by the members thereof 'respectively: provided that no such privileges, immu-'nities, or powers should exceed those then held, en-'joyed, or exercised by the Commons House of Parlia-'ment or the members thereof.' This clause was limited by a later one, which provided that that Act should not be repealed, altered, or varied unless the second and third readings of the amending Bill were passed with the concurrence of an absolute majority of the whole number of the members of the Legislative Council and of the Legislative Assembly; and every such Bill was to be reserved for the signification of Her Majesty's pleasure. The 56th section enacts that 'all 'Bills for appropriating any part of the revenue of 'Victoria, and for imposing any duty, rate, tax, rent, 'return, or impost, shall originate in the Assembly, and 'may be rejected, but not altered, by the Council.'

It was provided also by the Act that its provisions should have no force and effect 'until so much and such 'parts of certain Acts of Parliament specified in the 'Bill as severally related to the Colony, and were re-'pugnant to its provisions, had been repealed; and the 'entire management and control of the waste lands 'belonging to the Crown in the said Colony, and of the 'proceeds thereof, including all royalties, mines, and 'minerals, should be vested in the Legislature of the 'Colony.'

In the year 1855 an Imperial Act of Parliament

was passed[1] for the purpose of repealing the last-named Acts or parts of Acts which were repugnant to the Act of the Victorian Legislature just cited. This Act recites that it is not competent to Her Majesty to assent to the reserved Bill of the Victorian Legislature without the authority of Parliament for that purpose; and that it is expedient that Her Majesty should be authorised to assent to the said reserved Bill, amended by the omission of certain provisions thereof. The Act then proceeds to give the necessary powers to enable Her Majesty in Council to assent to the said Bill as amended, 'anything in the said specified Acts of Parliament or 'any other Act, law, or usage to the contrary in any 'wise notwithstanding.'

The Victorian Legislature was not slow in availing itself of the power of amending its own so-called Constitution Act of 1854, especially as respects the Constitution of the Legislative Assembly. In 1857 the property qualification for members was abolished, and in the same year vote by ballot was introduced. In 1858 a triennial term was substituted for the term of five years for the duration of the Assembly.

But it was not long before serious differences began to manifest themselves between the spirit, temper, and principles of the Council, which represented what may be called the moneyed aristocracy of the Colony, and the Assembly, which represented everybody else. These differences manifested themselves in a variety of ways, especially by a persistent habit on the part of the Council of rejecting important measures presented by the Assembly, and by reprisals on the part of the Assembly

[1] 18 and 19 Vict. cap. 55.

in the form of forcing the Council to accept distasteful measures at the risk of rejecting with them Appropriation Bills on the passing of which the whole working of Government depended. In a memorandum addressed to the Governor, dated the 27th of December, 1878, and signed by Mr. Graham Berry, the Prime Minister, on behalf of the Ministry, it is complained that 'during twenty-four years of legislative activity the Council has thrown out more than eighty Bills, has amended more than twenty others so that the Assembly preferred to let them drop, and has entirely transformed others, which the Assembly has agreed to take in their mutilated form. It maintained State aid to religion during fifteen years, in opposition to the expressed will of the country. It has thrown out, or mutilated till they were useless, six Bills for Mining on Private Property. It has seven times thrown out Bills for the Payment of Members. It has thrown out an Electoral Bill and a Tariff Bill that had been passed by large majorities. Besides the four Appropriation Bills, it has rejected one Temporary Supply Bill. It has thrown out a Bill to provide for the defence of the country at a time when invasion seemed imminent. A Bill for an International Exhibition in Melbourne was contemptuously thrown out on the plea that a protectionist colony had nothing to exhibit. It transformed a Bill for aiding industrial schools raised and maintained by voluntary efforts, into a system of schools almost at the sole charge of the State, which have proved costly and ineffective. Every Act that deals with the public domain will be found to contain a clause favourable to the capitalist class, which has been consented to by the

'Assembly on the ground that the Bill would otherwise 'be rejected in the Council.'[1]

This, no doubt, is the language of political adversaries; but it suffices to show the spirit and nature of the conflict, and it is not probable that the members of the Council would care to dispute the bare accuracy of the facts enumerated. There is no doubt whatever of the reality of the constitutional crisis, which is sufficiently apparent from the mere fact of there having been in 1878 two distinct measures before the Legislature for the amending of the Constitution Act, and from the great but unsuccessful efforts made through the medium of a conference between the two Houses to find a basis of reconciliation. The objects of the Assembly are declared to be (1) 'that the annual Appropriation Bill 'should in no circumstances be rejected by the Council,' and (2) 'that definite legislative finality should be pro-'vided with respect to all other Bills.' As a means of securing the latter object, it was proposed that when a Bill, other than a Money Bill, had been passed by the Legislative Assembly in two consecutive annual Sessions of Parliament and rejected by the Legislative Council in each Session, it should—unless it were 'submitted to ' and disapproved of by the electors for the Legislative 'Assembly at a general poll'—be deemed to be a Bill which had been properly passed by the Legislative Council.

The Council in their turn 'refused to consider any 'proposal that implied any legislative inferiority' in their House, and that was inconsistent with its independence. They also propounded two schemes as bases of reform,

[1] 'Further Correspondence respecting the Constitutional Question in Victoria,' 1879.

the chief features of which were that Appropriation Bills were not to contain any foreign matter, and that, in the case of continued disagreement between the Houses, the Governor might dissolve the Council at any time not within nine months of the legal expiration of the Assembly.

The Assembly proposed the reference of the rival Reform Bills prepared in the Council and in the Assembly to the general body of qualified electors; the result of a poll to be considered final, and to be carried into law by both Houses.

One difficulty which throughout has haunted the whole of this controversy has been the alleged parallelism of the Legislative Council to the British House of Lords. In his speech on opening the Session of 1878, the Governor, Sir G. F. Bowen, well said that the Constitution was intended to be fashioned on the model of the British Constitution, but 'unhappily, the attempt 'to embody in comparatively rigid Statute Law the 'elasticity inherent in the principles and practice of 'that Constitution had not been completely successful.' The fact that the Council distinctly represents property, and the property of only a few, affords it a distinct and special claim to resist apprehended invasions of property rights with a resoluteness for which no suitable analogy can be found in the circumstances and temper of the House of Lords. Confining itself to this function, the Council will properly guard against all precipitate or selfish legislation which might proceed from the non-moneyed classes; but if it affects to stem legislation by interposing an absolute veto upon the will of a highly democratised majority, no mere formal appeal to the precedent of a House of Lords, the members of which are

by long tradition, habitual contact, and an assemblage of unique moral and political conditions, in practical harmony with the bulk of the members of the House of Commons, can save it either from extinction or from an ignominious defeat which would reduce it to the status of the Second Chambers of some of the recently constituted Continental Governments.

A recent writer [1] has concisely described the situation by saying that 'the elements of the Parliamentary 'Government at present existing in Victoria are in-'capable of supporting a bi-cameral system strictly 'analogous to Lords and Commons.' Many suggestions have been made for meeting the difficulties of the position, besides those contained in the proposals of the Assembly and the Council, as embodied in their rival Bills for constitutional reform. It has been suggested that the Assembly might be made to include elements more distinctively representative of property; that in cases of dispute between the Houses, Conferences should take place with greater frequency and facility, and of a more organised kind, than at present feasible; that in such cases of dispute the Houses should combine, so as to form one body, for the purpose of voting, but not debating, on the point at issue, and that some large majority, say two-thirds, should be needed to carry a measure; that 'plébiscites' should be more frequently resorted to, or that the Council should be re-elected at shorter intervals, so as to make it less of a permanent and aristocratic body. It is observable that every one of these proposals is destructive of what is the essence of a true bi-cameral system, the independence of the two

[1] Mr. G. Baden Powell, in the *Fortnightly Review*, June 1879, 'Reform in Victoria.'

Chambers. The logical consequence of working out any of the above proposals, or any like them, is really that of substituting a single legislative body for two co-operating or conflicting ones. It is hopeless to expect that the rich few can finally control the many who are both rich and poor. With whatever cataclysms or shocks the artificial obstacles to the ascendency of the will of the numerical majority may be overthrown, overthrown they must be, as M. de Tocqueville long ago explained in the parallel case of the progress of democracy in the United States of America. The true and last lesson of democracy is, that a man's life consisteth not in the abundance of the things that he possesseth.

Before leaving the topic of Colonial Legislatures, it must be noticed that it has recently been laid down that the jurisdiction of such Legislatures extends no further than three miles from the shore. In 1855 the Law Officers of the Crown gave this as their opinion, when, referring to British Guiana, they said: 'We con-'ceive that the Colonial Legislature cannot legally 'exercise its jurisdiction beyond its territorial limits— 'three miles from the shore; or, at the utmost, can only 'do this over persons domiciled in the Colony, who may 'offend against its ordinances even beyond those limits, 'but not over other persons.'[1]

2. The history of the Government of India affords a good and memorable instance of the mode in which Parliament may gradually assume the direct and supreme government of every part of the British Dominions. This history comprehends the successive phases of (1) facilitation of trade, (2) organisation of government, (3), the reconstitution of the East India Company as a

[1] Forsyth's *Cases and Opinions*, p. 24.

purely political body, and (4) the transfer of the Government of India from the Company to the Crown as controlled by Parliament.

The history commences with the Charter of William III. incorporating a second East India Company, dated September 5, 1698. The Charter purported to be issued in pursuance of an Act 'for raising a sum not 'exceeding two millions upon a fund for payment of 'Annuities after the rate of eight pounds per centum 'per annum, and for settling the Trade to the East 'Indies.' For a period of nearly eighty years, the Charters which were granted, as well as the Statutes which occasionally supplemented or enforced them, dealt almost exclusively with trade; and the organisation of the Company as a Joint-Stock Trading Association was the purpose of the so-called 'Regulating Act' of 1773.[1]

So soon as the victories of Clive, and treaties with the native Princes, placed the Company in the actual possession of territorial acquisitions, Parliament passed Statutes for the purpose of confirming the Company in that possession for limited periods of years. Such Statutes were the 7th George III. cap. 57, and the 9th George III. cap. 24, which vested the acquired territory and revenues of the Company in them for periods respectively of two and of five years.

The first effective Parliamentary aggression on the independence of the Company—and, to some extent, also on the Prerogative of the Crown—was the passing of what is called the 'Regulating Act.' This Act recites that 'the several powers and authorities granted by 'Charters to the United Company of Merchants of 'England trading to the East Indies have been found,

[1] 13 Geo. III. cap. 63.

'by experience, not to have sufficient force and efficacy 'to prevent various abuses which have prevailed in the 'government and administration of the affairs of the said 'United Company, as well at home as in India, to the 'manifest injury of the public credit, and of the com- 'mercial interests of the said Company.' The Act, in its 13th section, further recites that King George II. had, by his Letters Patent, granted a Charter constituting Courts of Civil, Criminal and Ecclesiastical Jurisdiction in Madras, Bombay, and Bengal, and gives power to 'His 'Majesty, by Charter or Letters Patent under the Great 'Seal of Great Britain, to erect and establish a Supreme 'Court of Judicature at Fort William aforesaid, to consist 'of a Chief Justice and three other Judges, being barris- 'ters in England or Ireland, of not less than five years' 'standing, to be named from time to time by His Majesty, 'his heirs and successors.' This Statute was an important step in the process of consolidating the dominion of the Company as a territorial Government, and of bringing that Government under the direct control of Parliament. A still more decisive step in the same direction was the passing of the Act of 1833 (3 and 4 William IV. cap. 85). This Act, while confirming the Company in the possession of the territorial acquisitions and revenues then held by them for another twenty years, finally abolished the commercial character and operations of the Company, and converted it into a purely political body, having a delegated authority from Parliament to govern the British dominions in India. By the third section of the Act the exclusive right of trading with the dominions of the Emperor of China, and of trading in tea, was to cease in the following year. The fourth section enacted that the Company should 'with all con-

'venient speed after the twenty-second day of April '1834 close their commercial business and make sale 'of all their merchandise, stores, and effects at home 'and abroad distinguished in their account-books as 'commercial assets, and all their warehouses, lands, 'tenements, hereditaments, and property whatsoever 'which may not be retained for the purposes of the 'Government of the said territories, and get in all 'debts due to them on account of the commercial 'branch of their affairs, and reduce their commercial 'establishments as the same shall become necessary, 'and discontinue and abstain from all commercial busi-'ness which shall not be incident to the closing of their 'actual concerns, and to the conversion into money of 'the property hereinbefore directed to be sold, or which 'shall not be carried on for the purposes of the said 'Government.' It is the 43rd section of this Act which distinctly creates the Governor-General in Council a subordinate Legislature. The general legislative powers conceded are restricted by the latter part of the section, which makes the important exceptions that 'the said Governor-General in Council shall not have 'the power of making any laws or regulations which 'shall in any way repeal, vary, suspend, or affect any of 'the provisions of this Act, or any of the provisions of 'the Acts for punishing mutiny and desertion of officers 'and soldiers, whether in the service of His Majesty or 'the said Company, or any provisions of any Act here-'after to be passed in anywise affecting the said Com-'pany or the said territories or the inhabitants thereof, 'or any laws and regulations which shall in any way 'affect any prerogative of the Crown, or the authority 'of Parliament, or the constitution or rights of the

'said Company, or any part of the unwritten laws or 'constitution of the United Kingdom of Great Britain 'and Ireland whereon may depend in any degree the 'allegiance of any person to the Crown of the United 'Kingdom, or the sovereignty or dominion of the said 'Crown over any part of the said territories.' The next section, the 44th, gives power to the Court of Directors of the Company to disallow any law or regulation made by the Governor-General in Council.

The last epoch in the course of claiming for Parliament the direct government of India through the medium of the Prerogative of the Crown is marked by the passing of the Act of 1858 'for the better Government of India,' by which the government of the British territories in India was transferred from the East India Company to the Crown. (21 and 22 Vict. cap. 106.) The first section of this Act enacts that 'the Govern-'ment of the territories now in the possession or under 'the Government of the East India Company, and all 'powers in relation to Government vested in or exer-'cised by the said Company in trust for Her Majesty, 'shall cease to be vested in or exercised by the said 'Company, and all territories in the possession or under 'the Government of the said Company, and all rights 'vested in, or which if this Act had not been passed 'might have been exercised by, the said Company in re-'lation to any territories, shall become vested in her 'Majesty, and be exercised in her name; and for the 'purposes of this Act India shall mean the territories 'vested in Her Majesty as aforesaid, and all territories 'which may become vested in Her Majesty by virtue 'of any such rights as aforesaid.' The fourth section enacts that 'India shall be governed by and in the

'name of Her Majesty, and all rights in relation to any 'territories which might have been exercised by the said 'Company if this Act had not been passed shall and 'may be exercised by and in the name of Her Majesty 'as rights incidental to the Government of India; and 'all the territorial and other revenues of or arising in 'India and all tributes and other payments in respect 'of any territories which would have been receivable by 'or in the name of the said Company if this Act had 'not been passed, shall be received for and in the name 'of Her Majesty, and shall be applied for the purposes 'of the Government of India alone, subject to the pro-'visions of this Act.'

The subsequent legislation by which the powers of the Viceroy and his Council have been defined, and the relations between the Government at home and the Government in India have been ascertained and regulated, properly belongs to the topic of the Prerogative of the Crown in its reference to Parliament, under which head it will be discussed.

The 'Act for enabling Her Majesty to accept a sur-'render upon terms of the lands, privileges, and rights 'of "the Governor and Company of Adventurers of '"England trading into Hudson's Bay," and for admit-'ting the same into the Dominion of Canada,' which was passed on July 31, 1868, affords another instance of the process by which Parliament gradually brings within the range of a centralised form of Government outlying districts and territories which, for as long as two hundred years, may have been subject to no other administration than the peculiar and local one assigned by a Charter conceived far more in the interests of trade

than of government. Had the American Colonies not revolted, there can be little doubt that Parliament must have been called upon to provide some effective modern substitution for the old Charters under which they came into existence; but the course of American history has itself afforded so potent a precedent for the organisation of Colonies and more or less settled territories, that it is a mere vague speculation to conjecture what course colonial history would have taken if unaided by the warnings and examples supplied by the experience of the United States.

The settlement of British Columbia, and the annexation of the Fiji Islands and of the Transvaal, though illustrating at some points the present topic—that of the progressive absorption of the government of newly acquired or imperfectly organised territories by Parliament,—still more aptly illustrate the modes in which Parliament and the Crown compete and co-operate in the achievement of this end. It will thus be more suitable to allude in detail to these instances of Parliamentary activity when the Prerogative of the Crown in its relation to Parliament is treated of.

3. It may well be doubted whether, when a Colony has a Constitution conceded by Parliament, Parliament can intervene to legislate for any persons or officials who are subject to the Legislature created by the Constitution. But, previous to the establishment of a Constitution, there is no doubt that Parliament may interpose for conferring rights and imposing duties on some or all the inhabitants of particular Colonies or territories, which in all other respects are governed directly through the medium of the Royal Prerogative. Thus, long before New South Wales and Tasmania

acquired Constitutions from Parliament, it was enacted, by the 9th George IV. cap. 83, sect. 24, that all laws and statutes within the realm of England at the time of the passing of that Act (not being inconsistent with any Charter, or Letters Patent, or Order in Council, which might be issued in pursuance thereof) should be applied in the Courts of New South Wales and Van Diemen's Land, so far as the same could be applied within the said Colonies. The Act also provided that the Governors of those Colonies, with the advice of the Legislative Councils, might by Ordinances declare whether any particular laws or statutes extended to such Colonies. The Statute 23 and 24 Vict. cap. 121, after reciting that divers of Her Majesty's subjects had occupied or might hereafter occupy places, being possessions of Her Majesty, but in which no Government has been established by authority of Her Majesty, renders general the provisions of the 6th and 7th Vict. cap. 13, by which the Crown was empowered to establish, by Order in Council, laws, institutions, and ordinances for the government of Her Majesty's settlements on the Coast of Africa, and the Falkland Islands. Similarly, special and remarkable powers for making laws and regulations are conceded by the Indian Councils Act of 1861 (24 and 25 Vict. cap. 67) to the Governor-General in Council, and to the Governor-General alone. The legislative power conferred on the Governor-General alone is restricted to cases of emergency, and the laws and regulations made by him in pursuance of it only continue in force for six months, before the expiration of which time they may be disallowed by the Government at home, or controlled or superseded by a law or regulation made in the regular way by the Governor-

General in Council. This topic will be considered again in connection with the relations of the Ministers of the Crown to Parliament.

4. The assumed supremacy of Parliament over Colonial Legislatures as a whole, and as distinguishable from an assumed right of arbitrary supersession of the action of particular Colonial Legislatures, is manifested by the language of particular Statutes, and by the nature of legislative acts the validity of which has never been disputed. Thus, by the Statute of the 28th and 29th Vict. cap. 63, entitled 'An Act to remove doubts 'as to the validity of Colonial Laws,' it is enacted, that any colonial law repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnance, be void. By the same Act, the Colonial Legislatures are empowered to establish Courts of Judicature; and representative Legislatures (which are defined to be legislative bodies, of which one half is elected by inhabitants of the Colony) are empowered to make laws respecting their own Constitution, powers, and procedure, provided that such laws shall have been passed in conformity with any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the Colony. The term 'Colony' in this Act includes all Her Majesty's possessions abroad in which there exists a Legislature, except the Channel Islands, the Isle of Man, and British India. It is perhaps worth while here to call attention to an opinion given by Sir A. Cockburn,

Attorney-General, and Sir R. Bethell, Solicitor-General, on February 15, 1856, that 'the law and practice of 'Parliament, as established in the United Kingdom, are 'not applicable to Colonial Legislative Assemblies, nor 'does the rule of the one body furnish any legal analogy 'for the conduct of the other.'[1] This may be so, as a matter of strict legal interpretation; but no conclusion can be drawn from it as to what are the rights and duties of Colonial Legislative Assemblies designedly fashioned in greater or less conformity to the type supplied by the English Houses of Parliament. A political inference may exist, in the absence of all legal cogency.

In many recent Acts of Parliament, the Colonies have been distinctly named, either for the purpose of including or of excluding them. Thus the Copyright Act (5th and 6th Vict. cap. 45) says, that the words 'British Dominions' in the Act shall include 'all the 'Colonies, settlements, and possessions of the Crown,' and enacts that the Act shall extend to every part of the British Dominions. The Statute of the 26th and 27th Vict. cap. 6, after reciting that Her Majesty has from time to time caused Letters Patent to be made under the Great Seal, intended to take effect within Her Majesty's Colonies and possessions beyond the seas, enacts that no such Letters Patent shall (unless otherwise provided therein, or by other lawful authority) take effect until the making of them has been signified therein by proclamation or other public notice. The Documentary Evidence Act of 1868 (31 and 32 Vict. cap. 37) provides that, subject to any law that may be from time to time made by the Legislature of any

[1] Forsyth's *Cases and Opinions on Constitutional Law*, p. 25.

British Colony or possession, the Act shall be in force in every such Colony and possession; and it is made to extend to the Channel Islands and Her Majesty's Indian territories. By the 30th and 31st Vict. cap. 45, sect. 16, Her Majesty is empowered to establish Vice-Admiralty Courts in any British possession, notwithstanding that such possession may have previously acquired independent powers. So again, by the 29th and 30th Vict. cap. 65, Her Majesty may, by proclamation issued with the advice of the Privy Council, declare gold coins, made in any colonial branch of the Royal Mint duly established by proclamation, a legal tender within any part of the British Dominions.

The unity of the British Dominions, and the integrity of the quasi-federal relationships between the different parts of those dominions, are manifested in no way more conspicuously than in the practice and undisputed right of Parliament to pass Acts of the kind here enumerated. In the case of most or all of these Acts, no question of a competition of interests, as in the matters of taxation and colonial defence, is hinted at. The most questionable kind of legislation is perhaps that which enforces uniformity in the Copyright Law. In respect of the other matters, while a variety of rival interests must exist, as it exists in the case of contemplated Home Legislation, the reconciliation of these interests is a mere matter of compromise and bargaining, and, when effected, is likely to produce harmonious agreement and co-operation.

5. The relation of Parliament to the representatives of the Crown, such as Governors, Lieutenant-Governors, the Governor-General or Viceroy of India, Commissioners and Residents in that country, and special High

Commissioners appointed for temporary purposes, belongs to the general subject of the mode in which Parliament secures the responsibility to itself of the Ministers of the Crown. The subject therefore will be suitably and conveniently treated in connection with that later head.

Section V.—Foreign Affairs.

In treating of the functions of Parliament as lately developed and undoubtedly extended in many directions, the subject of Foreign Affairs would naturally occupy a prominent place. The main difficulty in treating the subject adequately is that of distributing it between the topic of Parliament as a substantive part of the Constitution and that of the relations of Parliament to the Ministers of the Crown. The division of the subject between these topics must at the best be somewhat arbitrary, and to many may appear capricious; but the task must nevertheless be attempted, if the claims of logic and systematic exposition are not to be set at nought.

Many causes have concurred to render the discussion of Foreign Affairs of far greater prominence in modern Legislative Assemblies than it was in previous centuries, except at such crises as urgently involved the honour of the country, or called for strenuous measures to provide for national defence and military or naval ascendency. Mr. Disraeli, who on all hands is admitted to have largely concerned himself with the actual or possible interests of Great Britain in different parts of the world, when explaining the policy of the Government to the headship of which he had just succeeded in 1868, spoke as follows: 'I now come to the greatest 'department of the State,—one which perhaps is brought 'less prominently before the House than others, but 'which, after all, more than any other affects the pro-'sperity of this country. Upon the judicious manage-

'ment of our foreign affairs depend peace or war, the 'tranquil pursuits of industry, and the amount of tax-'ation which must be levied in this country. For 'by a single blunder in the conduct of our foreign 'affairs, the most provident arrangement of finances 'ever planned may in a moment be cancelled and 'destroyed.'

The most prominent form in which foreign affairs, as treated in Parliament, come before the public, is that of debates on matters such as current wars, pending treaties, treaties lately signed or ratified, negotiations brought to light by the Parliamentary papers laid on the tables of the Houses, and the supplies of funds to carry out a foreign policy to which the Government has more or less decisively committed the country. But, in all these cases, the practical initiative, either in action or discussion, begins with the Ministers of the Crown, and the functions of Parliament are rather exercised in controlling, directing, stimulating, or resisting the action of the Crown, than in originating a distinct course of action of its own. An exception to this practical limitation of the functions of Parliament was presented on the occasion of the discussion and vote which took place in 1873 on Mr. Richard's motion with respect to Arbitration. Mr. Richard endeavoured to commit Parliament and the Government to a distinct and novel course of policy, which was repudiated by one of the strongest Governments of modern times, that of Mr. Gladstone, but, as the division showed, repudiated without success. The House of Commons, in fact, affirmed a right, co-ordinate with that of the Crown, to initiate a foreign policy of its own. It was on the 8th of July, 1873, that Mr. Richard moved in the House of

Commons 'that an humble address be presented to Her 'Majesty, praying that she would be graciously pleased 'to direct her principal Secretary of State for Foreign 'Affairs to enter into communication with foreign 'Powers with a view to the further improvement of 'International Law, and the establishment of a general 'and permanent system of International Arbitration.' The motion was opposed mainly on the ground that it was premature; and Mr. Gladstone, who 'saw great 'value in the motion of his honourable friend,' said 'he 'was convinced that this question, for a long time to 'come, would only make practical progress by a steady 'adherence on the part of those Powers who are rightly 'inclined, and convinced, and persuaded on the subject, 'to the principle,—first, of governing themselves by 'justice and moderation, and next, of losing no oppor- 'tunity of recommending the peaceful settlement of 'disputes between nations.' The motion was carried against the Government by a majority of ten.

It is thus in connection with the Prerogative of the Crown and its exercise that the Parliamentary attitude towards Foreign Affairs will be more properly treated of. But there is a certain kind of action due to the relations of this country with foreign countries, and of Englishmen with foreigners, which, from first to last, can only be carried out by Parliament itself. This action relates to, 1, foreigners in the British dominions, 2, British subjects in foreign dominions, 3, the giving of legal and statutory effect to the dictates of International Law.

1. (1.) It has always been doubted whether there is any right, independently of special Convention, to the extradition of criminals who have fled from the scene of

their crime for refuge in a foreign country. The practice in this country for a long time back has been for the Crown to make special Conventions with one State and another for the purpose of extradition, specifying in every such Convention the crimes, according to their designation in each country, for which alone extradition would be granted, and also prescribing in general terms the formalities and safeguards of personal liberty which were to attend the act of extradition in every particular case. An Act of Parliament has then been obtained, on the solicitation of the Ministers of the Crown, for giving effect to the special Convention just concluded. A noticeable change in the policy and practice of extradition was made by a Statute passed in 1870 and amended in 1873.[1] This Act was to apply to all future treaties of extradition, which must consequently be made in contemplation of its provisions; and all need for further occasional legislation was superseded. Besides amending and much enlarging the list of offences which had been customarily included in treaties of extradition, the Statute provided some entirely new guarantees against abuses by the Executive, whether brought about by carelessness or by connivance with the despotical agents of a foreign Power. Henceforth, extradition could only be accorded when the evidence was of exactly the same quality and amount as would be needed to procure the issue of a warrant for the apprehension, or the committal for trial, of a person charged with the commission of the same crime in this country. The Police Magistrate, or Secretary of State, might refuse to surrender, if in the view of either of

[1] 33 and 34 Vict. c. 52; 36 and 37 Vict. c. 60.

them it appeared that the real purpose of the requisition was to punish the fugitive for a political offence. A period of fifteen days was to intervene between the committal of the accused to prison and his surrender, in order to afford him a fair opportunity of having the grounds of his committal judicially investigated on the return to a writ of *Habeas Corpus*. The Secretary of State was empowered, at any time during the proceedings, to order the prisoner to be discharged from custody. It was also enacted that 'a fugitive criminal 'shall not be surrendered to a foreign State unless pro-'vision is made by the law of that State, or by arrange-'ment, that the fugitive criminal shall not, until he 'has been restored, or had an opportunity of returning, 'to Her Majesty's dominions, be detained or tried in 'that foreign State for any offence committed prior to 'his surrender other than the extradition crime proved 'by the facts on which the surrender is grounded.' A practical difficulty arose in the application of this Act in 1876, when the United States Government sought to obtain the surrender of a criminal (Winslow), to whose extradition they had an undoubted right under a subsisting treaty, named the Ashburton Treaty, which had been made in 1842, and was to continue in force till notice should be given to the contrary; but to whose extradition they would only be entitled, according to the Act of 1870, on the condition of their giving an assurance to the British Government that the prisoner should not be tried for any other offences than the one in respect of which extradition had been accorded. Apart from all treaty considerations, it might have been argued in favour of the United States' claim that by his flight the criminal could not obtain any immu-

nity or indemnity for the consequences of acts done through the whole course of his life previous to it; and that the purpose of the formalities insisted on was not to cast a mantle of protection round real criminals, but to secure that no person dwelling under British protection be delivered up to a foreign Government on specious and unreal grounds. But the British Government was bound by the new Act of Parliament; and the only issue from the difficulty was found in concessions by the United States Government, and in the making of a new treaty embodying the provisions of the Act.

(2.) The well-established British doctrine that no person could ever divest himself of the character of British citizenship when once it had attached, had led, in the circumstances of modern colonisation, travel, foreign residence and service, and commercial intercourse, to ambiguities and perplexities, in respect both of rights and of duties, which urgently called for Parliamentary relief. On the recommendation of a Royal Commission, the Naturalisation Act of 1870 was passed,[1] which entirely revolutionised the older doctrines, and established the position of foreigners in this country, and of Englishmen abroad, on a basis conformable to the requirements of civilisation and free international intercourse. By this Act, for the first time, aliens were enabled to own and to convey all kinds of property, excepting British shipping, under no other restrictions than those which apply to British citizens. A British citizen who became voluntarily naturalised in a foreign State was henceforth to cease to be a British citizen,

[1] 33 and 34 Vict. c. 14.

unless within two years he made such a declaration of his wish to remain a British citizen as was required by the Act. Provision was also made for the resumption of British nationality on the performance of the same conditions as were required for the naturalisation of aliens.

(3.) There is no doubt that by the English Common Law it is a misdemeanour for a number of British subjects to combine and conspire together to excite revolt among the inhabitants of a friendly State, or even to subscribe in this country to aid a rebellion against a foreign Government in amity with the Crown.[1] It is remarkable, as an instance of Parliamentary assent to the principle of this doctrine, that when, in 1857, in consequence of the Orsini attempt to assassinate the Emperor of the French on the 14th of January, Lord Palmerston moved the reading for the first time of his Conspiracy Bill, the effect of which was to convert the crime of conspiracy to murder from being a misdemeanour into a felony punishable with penal servitude, the Bill, although strongly opposed, was read a first time by the vote of a majority of no less than two hundred. But between the first reading and the motion for the second reading of the Bill, the nation and the House of Commons had become almost irrationally indignant at a publication in the *Moniteur* of some assertions of members of the French army, speaking of the English as 'protectors of assassins,' and uttering threats to the effect that 'the infamous haunt in which such infernal 'machinations were planned should be destroyed for 'ever.' Lord Palmerston urged in the House that it

[1] See Forsyth's *Cases and Opinions*, p. 236; and Lord Lyndhurst in the House of Lords, March 4, 1853.

would be unworthy of the nation to be turned from a course otherwise proper by the idle vapourings of irresponsible swash-bucklers, and 'upon any paltry feelings 'of offended dignity, or of irritation at the expressions 'of three or four colonels of French regiments, to act 'the childish part of refusing an important measure on 'grounds so insignificant and trumpery.' Mr. Milner Gibson moved as an amendment to the motion for the second reading, 'that this House cannot but regret that 'Her Majesty's Government, previously to inviting the 'House to amend the law of conspiracy at the present 'time, have not felt it to be their duty to reply to the 'important despatch received from the French Govern-'ment, dated January 20.' This despatch was little more than a request that the British Government would assist the French Government in 'averting a repetition 'of such guilty enterprises.' In the course of the debate, Mr. Disraeli declared that, while on the first reading the question was between England and France, on this, the second reading, by some strange metamorphosis, it had become one between the House of Commons and the English Minister, and he announced that he sided with the House. This adroit ruse, by which the idea of the House's consistency was maintained, and the pent-up national indignation gratified by being directed against the Government of Lord Palmerston, succeeded in placing that Government in a minority of nineteen, which resulted in its resignation. The details are of some importance from a constitutional point of view, as showing that it was not the principle involved in the legislation proposed that was objected to by Parliament, but the time of and the alleged motives for that legislation.[1]

[1] Ashley's *Life of Lord Palmerston*, vol. ii. p. 142.

2. The legislation which has taken place of late years with respect to British subjects abroad has to do either with the constitution of Courts of Justice in foreign territory, by the authority of the Government of that territory,—if any organised Government exists; or with the rights and duties of British subjects anywhere outside British territory, as for instance on the high seas, or in districts or islands not subject to a recognised Government.

The right of extra-territorial jurisdiction was claimed in 1847 as being inherent in the Prerogative of the Crown in certain assigned cases. A Royal Warrant of that year, which constituted a Judicial Assessor on the Gold Coast of Africa, recites, that 'we have, by usage 'and sufferance, or by one or other of these, or by other 'lawful means, power and jurisdiction within divers 'countries and places, not of, but adjacent to, our forts 'and settlements on the Gold Coast.'[1]

The Foreign Jurisdiction Act of 1843[2] recites that 'whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power 'and jurisdiction within divers countries and places out 'of Her Majesty's dominions: and whereas doubts have 'arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws 'and customs of this realm, and it is expedient that 'such doubts should be removed'—the Statute then enacts 'that it is and shall be lawful for Her Majesty 'to hold, exercise, and enjoy any power or jurisdiction 'which Her Majesty now hath or may at any time

[1] Forsyth's *Cases and Opinions*, p. 232, and Earl Grey's *Colonial Policy*, vol. ii. p. 270.

[2] 6 and 7 Vict. c. 94.

'hereafter have within any country or place out of 'Her Majesty's dominions, in the same and as ample 'a manner as if Her Majesty had acquired such power 'or jurisdiction by the cession or conquest of territory.' An important extension of the principle of this Statute was contained in the Foreign Jurisdiction Act of 1878.[1] Under this Act (sections 5 and 6), the power and jurisdiction conceded by the earlier Act of 1843 are extended to any 'country or place out of Her Majesty's 'dominions, in or to which any of Her Majesty's sub-'jects are for the time being resident or resorting, and 'which is not subject to any Government from whom 'Her Majesty might obtain power and jurisdiction by 'treaty or any of the other means mentioned in the 'Foreign Jurisdiction Act, 1843.' The Queen in Council was also empowered to make, by Order in Council, for the government of Her Majesty's subjects being in any vessel at a distance of not more than one hundred miles from the Coast of China or of Japan, 'any law that to Her Majesty in Council may seem 'meet, as fully and effectually as any such law might be 'made by Her Majesty in Council for the government 'of Her Majesty's subjects being in China or Japan.'

It seems to have been in virtue of the Foreign Jurisdiction Acts, from 1843 to 1878 inclusive, that the British government in Cyprus was organised in the year 1878. According to the *London Gazette*, a meeting of the Privy Council took place at Balmoral on September 14, 1878. At this meeting an Order in Council was made, the preamble of which runs as follows: 'Whereas it is expedient to make provision for the

[1] 41 and 42 Vict. c. 67.

'exercise of the power and jurisdiction vested by treaty 'in Her Majesty the Queen in and over the Island of 'Cyprus: now therefore Her Majesty, by virtue of the 'powers in this behalf by the Foreign Jurisdiction 'Acts, 1843 to 1878, or otherwise, in her vested, is 'pleased with and by the advice of Her Privy Council 'to order, and it is ordered, as follows:' and thereupon it is ordered that there should be a High Commissioner and Commander-in-Chief, to be appointed by Commission under Her Majesty's sign-manual and signet; and also a Legislative Council who should generally advise the High Commissioner in making laws and regulations. But the High Commissioner was to have the same power as the Viceroy of India, of making, in cases of emergency, orders to be in force for six months. The Order repeals all previous Orders of Council which have been made for the regulation of consular jurisdiction in the dominions of the Sublime Porte, and other similar Orders, so far as the Island of Cyprus was concerned; and the present Order was to remain in force until the same should be revoked or altered by Her Majesty with the advice of her Council. As a specimen of the Ordinances here contemplated, enacted by 'the High Commissioner and 'Commander-in-Chief of the Island of Cyprus, with the 'advice of the Legislative Council,' may be cited the following Ordinance, since repealed, dated the 16th day of December, 1878, the object of which was said to be 'to 'provide for the execution of works of public utility in 'the Island of Cyprus by the inhabitants.' The Ordinance recites that it 'has been the custom for the in-'habitants of the Island of Cyprus to contribute by 'their labour to the making of roads and the execu-'tion of other works of public utility,' and that 'it is

'expedient to provide for the continuance and regulation 'of this custom.' In the January of every year, a list has to be prepared, in every town and village, of all the able-bodied men between the ages of sixteen and sixty, exclusive of those in the service of the Government, and of priests and ministers of all religious denominations. On a requisition for labour being made by the Commissioner of any district, the head-man and the council of the village are to choose by lot from the list the number of men required to perform the labour. The labour is to be paid for at the rate of not less than a shilling per day of ten hours; and any person quitting his work without permission is liable to a fine not exceeding a pound, or to be imprisoned, with hard labour, for a period not exceeding a month.

This institution of forced labour, which in no particular except that of its softened title can be distinguished from slavery, gives fresh importance to the question, already raised by the Order in Council constituting the form of British government in Cyprus, as to whether Cyprus is to be treated as a Crown Colony,—that is, a territorial possession the government of which is initiated and formally prescribed by the Executive, in the exercise of the Royal Prerogative,—or whether it is a territory over which the British Government has temporarily and provisionally nothing more than certain limited rights, conceded by the real Sovereign authority, the Sultan of Turkey, for the purpose of securing orderly administration, and rendering the place available as a military and naval centre in case England should be called upon to carry into effect those clauses of the Convention transferring the possession of Cyprus, which would oblige her in certain emergencies to protect the Asiatic

dominions of the Sultan against Russia. The citation, at the head of the Order in Council, of the Foreign Jurisdiction Acts would seem to favour the latter view,—that is, that Cyprus is in no sense ceded to Great Britain, but is merely foreign territory over which the British Government, in the exercise of powers conceded by Parliament, and by virtue of a temporary Convention with the Sovereign authority to whom Cyprus belongs, is entitled to exert certain defined functions. There is no doubt that, in the case of any true British territory, such an ordinance as that which perpetuates a system of slavery would be instantly repudiated by Parliament as soon as its attention was called to it. Certainly no greater public inconvenience could accrue from the disallowance for the first time of the enforcement of such a system, even in territories previously habituated to it, than the wide-spread disaster and calamities which ensued on the sudden abolition of private slavery in the West India Islands. It must, then, be assumed that Cyprus is at present not part of the British dominions, and that if ever, by further transactions with Turkey, it becomes so, the system of forced labour would in any case have been abolished. Of course a further political question is suggested, that cannot here be discussed, as to whether, in the course of indoctrinating the Turkish Government with sounder principles of administration, it was well to lose a signal opportunity of evincing the superior moral and economic advantage of a system of private contract over that system of servitude which, in one shape or another, is one of the main causes of the decrepitude and demoralisation of the Turkish dominions.

These views seem to have been to some extent appreciated by the British Government, as appears from

a later despatch (given below) of Lord Salisbury, the Foreign Secretary, which led to the repeal of the Ordinance. The despatch has a further importance as exhibiting the existing constitutional attitude of the country towards slavery, or towards what the Government apprehend may be interpreted as slavery. Before the promulgation of the Ordinance,—that is, on the 9th of September, 1878,—Sir Garnet Wolseley, writing to Lord Salisbury, says: 'I would propose to discuss this 'matter in the Legislative Council, and, acting upon 'the advice of the three island members, to bring out a 'law upon the subject, taking care in no way to interfere with the farming operations. I should not like 'to discuss the subject at Council unless I was assured 'that the Ministry would consent to the general principle involved, namely, of insisting upon the people 'supplying labour for public works of general utility— 'a principle which is acted upon in India, and, I believe, 'in all Eastern countries. Under the Turkish law 'every man is obliged to give to the public a certain 'number of days' work on the roads—twenty consecutive 'days' work every five years—during the period extending from the 1st of May to the 1st of November of each 'year. Do you approve of my introducing a law with 'this object in view, or may I act on the Turkish law 'existing without any fresh legislation?'

On the 20th of March, 1879, Lord Salisbury writes as follows to Sir Garnet Wolseley:

'Foreign Office, March 20, 1879.

'I have received your despatches of December 17 'and February 3, inclosing to me an Ordinance on 'Public Works passed by the Legislative Council of

'Cyprus. In your despatch of December 17, you stated 'that the Ordinance in question was one which would 'be seldom if ever brought into operation, implying 'that at that time you did not contemplate any imme- 'diate employment of the powers conferred by it. It 'did not seem, therefore, a matter of urgency to com- 'municate with you in respect to it, and it has been 'postponed to more pressing questions. Within the 'last two days, however, I have received information 'from a private source, to the effect that the Ordinance 'has been put into operation in one locality, and there- 'fore it is desirable that I should without further delay 'place you in possession of the views of Her Majesty's 'Government in regard to its provisions. On October '25, in reply to a semi-official communication from 'you, I sent to you a telegram, from which the follow- 'ing is an extract: "You may requisition labour either '"under old law or a new one, as you please. But we '"think punishment in default should be a fine on '"village and not fall on individuals; otherwise we shall '"be charged with setting up slavery." The Ordinance 'as it has actually passed, in so far as the greater part 'of it is concerned, is substantially in harmony with 'these instructions. One clause, however, in the Ordi- 'nance (the tenth) is not entirely in accordance with the 'principle laid down in my telegram of the 26th 'October. It provides that persons electing to con- 'tribute by way of labour instead of payment shall be 'compelled to perform the labour they have undertaken 'by imprisonment, if necessary. They are not forced 'to labour in the first instance; but they are forced to 'complete their tale of days' labour when they have 'once elected that their contribution shall be in the

'form of labour. Provisions as to forced labour for the 'construction and repair of public roads, &c., have 'been very generally introduced in the legislation of our 'North American, West Indian, and Eastern Colonies, 'as well as in India, and are not unknown to the laws 'of this country and of Scotland. If, therefore, this 'provision were to be judged merely by the precedents 'which are furnished by other of Her Majesty's posses- 'sions, no objection would be taken to the course which 'you have pursued. Nevertheless, Her Majesty's Govern- 'ment think it, on the whole, wiser to adhere, in the 'present instance, to the policy laid down in my telegram 'of October 25, and they do so on the grounds stated 'in that instruction. Any arrangement which would 'give the opportunity of imputing, however erroneously, 'to the English Government a practice which could be 'represented as being akin to slavery, might weaken its 'authority in dealing with neighbouring countries where 'slavery still exists. The geographical situation of 'Cyprus lends a special importance to this considera- 'tion. An equally cogent reason is to be found in the 'circumstance, that in executing any law of this kind, 'your Excellency will be compelled to rely on the in- 'strumentality of agents who have not been trained 'under an English Government. I have to request you 'therefore, at an early meeting of your Legislative 'Council, to propose the repeal of so much of the tenth 'clause as sanctions the use of imprisonment for the 'purpose of compelling the performance of labour. The 'person absenting himself from work, after electing to 'make his contribution in labour, should, of course, still 'remain liable for a moderate pecuniary penalty im- 'posed upon him for failing to fulfil his engagement.'

That the public feeling of the country and the current interpretation of the Constitution are still able to present a vigorous and effective reaction against the reintroduction of slavery, or the patronage of the system of slavery in any form, was manifested in the course of the years 1875 and 1876, on the occasion of the Admiralty attempting, through the medium of what became known as the 'Fugitive Slave Circulars,' to deny to slaves escaping on board one of Her Majesty's ships within the territorial waters of a slave-holding Power so much as even a temporary right of asylum. The first of these Circulars was issued on August 21, 1875, and among other things, it peremptorily directed officers in command of Her Majesty's ships that a fugitive slave, in the case alluded to, 'must not be allowed to 'remain on board after it has been proved to the satis-'faction of the officer in command that he is legally a 'slave.' Another Circular, modifying the severe terms of the first, was subsequently issued, in deference to the strong expression of public opinion which had been elicited. A Royal Commission was then appointed to ascertain the state of the law, and the consequence was the final substitution of a Circular of a wholly different and innocuous kind. It is to be noticed that the public objection was not grounded on any supposed moral or legal duty binding on all officers in command of Her Majesty's ships to recognise an absolute right of asylum in all slaves taking refuge from their masters on the adjoining territory, but on the generality of the direction that in no case was the officer to grant an asylum, and the implication in the presence of foreign Powers to the effect that for the purpose of retaining fugitive slaves Her Majesty's ships in foreign ports had no

longer, as they were believed to have, all the privileges of British territory. The inconvenience also of imparting to naval officers a judicial character, for the purpose of determining the 'legality' of a condition which both the English Constitution and English traditions of the most unmistakable sort combine to abhor, was too obvious to stand a few moments' popular criticism, and still less the searching ordeal of a Royal Commission.

The principle of extending the authority of the British Government beyond the territorial limits of the British dominions has been recognised in the case of India by the Acts of 1861, 1865, and 1869.[1] The Act of 1861 enables the Governor-General in Council to make 'laws and regulations for all persons, whether 'British or native, foreigners or others, and for all 'Courts of Justice whatever, and for all places and 'things whatever, within the Indian territories now 'under the dominion of Her Majesty, and for all ser-'vants of the Government of India within the domi-'nions of Princes and States in alliance with Her 'Majesty.' The Act of 1865 enables the Governor-General of India in Council to make laws and regulations for all British subjects of Her Majesty within the dominions of Princes and States in India in alliance with Her Majesty, whether in the service of the Government of India or otherwise. The Act of 1869 enables the Governor-General in Council to make 'laws and 'regulations for all persons, being native Indian subjects 'of Her Majesty, without and beyond, as well as within 'the Indian territories of Her Majesty.'

[1] 24 and 25 Vict. cap. 67 28 Vict. cap. 17; 32 and 33 Vict. cap. 97.

A remarkable instance of an extension of jurisdiction by Act of Parliament over places outside the British dominions is supplied by what is known as the Kidnapping Act of 1872.[1] The Act recites that 'criminal outrages by British subjects upon natives of 'islands in the Pacific Ocean, not being in Her 'Majesty's dominions, nor within the jurisdiction of 'any civilised Power, have of late much prevailed and 'increased, and it is expedient to make further pro-'vision for the prevention and punishment of such 'outrages.' The offences punishable under the Act are such as carrying native labourers from islands in the Pacific Ocean without complying with the formal requirements of any of the Australasian Colonies in respect of vessels sailing from the ports of such colony; decoying natives for the purpose of importing or removing them without their consent; shipping, embarking, or confining them on board any vessel, either on the high seas or elsewhere, without their consent; contracting for such shipping, embarking, receiving, detaining, or confining of natives; and fitting out, manning, equipping, or hiring vessels, or commanding or even being on board vessels, with intent to commit, 'or 'that anyone on board such vessel should commit,' such offences. The offence is to be felony; and the accused may be tried in any Supreme Court of Justice in any of the Australasian Colonies, and upon conviction be liable, at the discretion of the Court, to the highest punishment other than capital punishment, or to any less punishment awarded for any felony by the law of the Colony in which such offender shall be tried. The

[1] 35 and 36 Vict. cap. 19.

Act further gives considerable powers of detaining, seizing, and bringing in for adjudication before the Vice-Admiralty Court any British vessel which upon reasonable grounds is suspected of being or having been employed in the commission of any of the offences enumerated in the Act, or of having been fitted out for such employment. If the charge is established, the vessel may be forfeited to Her Majesty.

The pertinacious continuance of slavery as an institution in Africa and the Turkish dominions, and especially on the shores of the Persian Gulf, has lately led to renewed efforts on the part of Parliament to supplement and consolidate the older Statutes for the suppression of the Slave Trade, and to give increased powers and jurisdiction to Vice-Admiralty Courts for the purpose of giving effect to those Acts. By the 'Slave Trade Jurisdiction (Zanzibar) Act, 1869,'[1] special provision was made for the exercise of a limited Vice-Admiralty jurisdiction, in matters relating to the Slave Trade, by Her Majesty's Consul within the dominions of the Sultan of Zanzibar. A similar Act was passed in 1873,[2] by which 'all jurisdiction which is by any Act conferred 'on the Vice-Admiralty Courts in Her Majesty's posses-'sions abroad in regard to British vessels seized by the 'commander or officer of any of Her Majesty's ships, 'on suspicion of being engaged in or fitted out for the 'Slave Trade, and in regard to the persons, goods, and 'effects on board thereof,' was, in certain specified cases, conferred on the 'East African Courts.' 'The East 'African Courts' was interpreted to mean the Vice-

[1] 32 and 33 Vict. cap. 75. [2] 36 and 37 Vict. cap. 59.

Admiralty Court at Aden, and any of Her Majesty's Consuls within the dominions of the Sovereigns of Zanzibar, Muscat, and Madagascar, when exercising jurisdiction in pursuance of certain recited Orders in Council.

The Consolidation Act of the same year (1873)[1], which has for its purpose the 'carrying into effect 'treaties for the more effectual suppression of the Slave 'Trade, and for other purposes connected with the 'Slave Trade,' is far more comprehensive in its objects than any previous Act. It makes provision for carrying into effect not only all existing treaties for the more effectual suppression of the Slave Trade, but 'any 'Treaty which may hereafter be made by or on behalf 'of Her Majesty with any foreign State,' for the same purpose. The general principle of all these Acts is, to treat any vessel belonging to the citizens of contracting Powers, engaged in or fitted out for the Slave Trade, or suspected of being so, in exactly the same way as an enemy's ship is treated in time of war; and to give all the necessary powers to the commanders and officers of Her Majesty's ships to visit, seize, and detain suspected vessels, and to carry them away, with those on board, to a Vice-Admiralty Court for adjudication. The Acts provide in detail for all the subsequent proceedings, and for giving bounties, estimated on the value of every slave released, to the commanders who effect the capture.

An interesting case of the extension of jurisdiction by the mere fiat of an Act of Parliament is presented by the passing of the Territorial Waters Jurisdiction

[1] 36 and 37 Vict. cap. 88.

Act of 1878.[1] A case had recently occurred which had raised the question whether the criminal jurisdiction of a British court extended as far as three miles from the shore of the British dominions. A German ship, the *Franconia*, had run down an English one, the *Strathclyde*, at a distance of about two and a half miles from the port of Dover, and the German captain had been put upon his trial for manslaughter, and convicted. It was objected at the trial that the prisoner was a foreigner, in a foreign vessel, out of the jurisdiction of the Court. The decision was appealed against, and after an argument before thirteen Judges in the Court for the Consideration of Crown Cases Reserved, the conviction was quashed by a majority of one. Mr. Justice Lush laid down the principle that the dominion of the territorial waters round the British Islands was not a dominion arising out of Common Law, but by the action of Parliament; and therefore that, although as regarded all foreign countries the waters surrounding Great Britain were termed the territorial waters of this country, yet when jurisdiction had to be exercised, it could only be exercised by the authority of Parliament. But in 1848, in an Act for the regulation of the Customs, there was an actual limit of jurisdiction assigned for the case of the Cinque Ports, and that limit was established seaward at three miles from low-water mark. The majority of the Judges, however, thought that the original jurisdiction over the high seas round the kingdom was in the Lord High Admiral, and did not attach to foreigners; and that the Act

[1] 41 and 42 Vict. cap. 73. See the Lord Chancellor's speech on introducing the Bill in the House of Lords, February 14, 1878.

which transferred it to the Crown only transferred it as it existed. In introducing in the House of Lords a Bill for regulating 'the law relating to the trial of 'offences committed on the sea within a certain distance 'from the coasts of Her Majesty's dominions,' the Lord Chancellor argued at considerable length that it was competent for Parliament to legislate with respect to the zone of waters immediately about the British Islands without the consent of foreign nations. The Bill, which, when passed, became 'The Territorial Waters Jurisdiction Act, 1878,' contains a recital which is not without both constitutional and international importance. It asserts that 'the rightful jurisdiction of Her 'Majesty, her heirs and successors, extends, and has 'always extended, over the open seas adjacent to the 'coasts of the United Kingdom, and of all other parts 'of Her Majesty's dominions, to such a distance as is 'necessary for the defence and security of such domi-'nions.' And 'it is expedient th at all offences com-'mitted on the open sea, within a certain distance of 'the coasts of the United Kingdom and of all other 'parts of Her Majesty's dominions, by whomsoever 'committed, should be dealt with according to law.' The Statute then enacts (section 2) that 'an offence 'committed by a person, whether he is or is not a sub-'ject of Her Majesty, on the open sea within the terri-'torial waters of Her Majesty's dominions, is an offence 'within the jurisdiction of the Admiral, although it 'may have been committed on board or by means of a 'foreign ship, and the person who committed such 'offence may be arrested, tried, and punished accord-'ingly.' It is interesting to notice that in the course of this Act the expressions 'Law of Nations' and

'International Law' both occur in a way which seems to impart to that Law a substantive character and significance which, though often admitted by Judges in the course of making vague observations about the mode in which the Common Law embodies the Law of Nations,—as it is also said to embody the Law of God, and probably most other sorts of Law which are matters of commendation,—have not often, if ever, been formally conceded to it by Act of Parliament. The fifth section enacts, that 'nothing in this Act contained shall be 'construed to be in derogation of any rightful jurisdic-'tion of Her Majesty, her heirs or successors, under the 'Law of Nations.' The sixth section says that 'this 'Act shall not prejudice or affect the trial in manner 'heretofore in use of any act of piracy as defined by the '"Law of Nations," or affect or prejudice any law re-'lating thereto.' The following interpretation-clause, however, contains the gist of the whole Act:—

'"The territorial waters of Her Majesty's domi-'"nions," in reference to the sea, means such part of 'the sea adjacent to the coast of the United Kingdom, 'or the coast of some other part of Her Majesty's 'dominions, as is deemed by International Law to be 'within the territorial sovereignty of Her Majesty; 'and for the purpose of any offence declared by this 'Act to be within the jurisdiction of the Admiral, any 'part of the open sea within one marine league of the 'coast, measured from low-water mark, shall be deemed 'to be open sea within the territorial waters of Her 'Majesty's dominions.'

3. The dictum has just been alluded to that the Common Law of England embodies International Law. It is obviously nothing more than an ornate dictum,

because it is notorious that some of the gravest political perplexities into which this country has been plunged of late years have been due to the confessed insufficiency of English Common or Statute Law to enable the British Government to carry into effect the undisputed duties and liabilities to which the country was subject by International Law. Thus, an important function of Parliament in respect to Foreign Affairs has been that of giving increased powers to the Government of discharging international legal liabilities, and, so far as is possible, of enforcing on British citizens generally the legal duties which International Law imposes upon them. The most urgent occasion for such Parliamentary intervention arises when this country is neutral during a war between two foreign States, with both of which British subjects are habituated to have constant and extensive mercantile or social relations. In these cases the abstract neutrality of the country as a whole, and of the Government as its representative, is seldom shared by the bulk of the trading community and of private citizens. There is generally an inclination of sympathy to one of the belligerents or the other; and it usually happens that a considerable division of feeling exists in the country as to which side it is hoped will eventually prosper. Such uncertain determinations of mere feeling are greatly intensified, if not wholly directed, by personal interests.

It cannot be said that, in legislating for the purpose of ensuring the observance of neutral duties on the part of British citizens, Parliament has succeeded in maintaining a strictly logical course, so as to discriminate with exactness and impartiality between the un-neutral acts which shall be prevented, and those which, so far

as English law is concerned, shall be allowed. Perhaps the only recognisable principle in this class of legislation is, that those acts alone have been made the topics of it which, from the magnitude of the operations they necessarily cover, or the overtness with which they must be conducted, or the decisiveness of their bearing on the belligerent issue, seem to be singled out as the only possible and suitable ones for inviting the special intervention of the Legislature in derogation of the much-prized liberty of the subject.

The most noticeable instances in recent times of support given to the sanctions of International Law and Policy by statutory enactments are supplied by legislation for the purpose of preventing the negotiation of loans in this country, when belligerent, with the citizens or Government of a neutral State, with the purpose of the money so lent being transferred to the State with which this country is at war; and the amended Foreign Enlistment Act of the present reign, by which ship-building and enlisting of soldiers in this country, when neutral, for the benefit of any belligerent Power, are subjected to preventive measures and penalties of a wholly unprecedented kind.

The difficulty of legislating for the case of succouring a State at war with England by the negotiation of loans is enhanced by the fact that these loans are always negotiated through the medium of a neutral State. It has been held to be the law of England that if an English subject lends money to a Government at war with this country, he commits the crime of treason. The offence is that of giving aid to the enemies of the Sovereign within the realm or elsewhere. But, in the Crimean war, the case was imagined, perhaps not with-

out solid grounds of reality, of the Russian Government negotiating loans in a neutral capital, such as Vienna, and an English capitalist buying and paying for the Russian bonds thereupon issued. It was possible that the two transactions might be quite unconnected, and therefore that the Vienna banker who issued the loans could in no sense be considered the agent or partner of the English purchaser. It would, however, largely depend upon the facility with which the Russian bonds could be disposed of in the different European markets, and the terms upon which they were taken, how many of them could be issued by the Russian Government. A Bill was consequently introduced, in the year 1854, into the House of Commons, having for its object the rendering illegal the purchase by a British subject of any bonds or securities issued by the State then at war with England, if those securities were created subsequently to the declaration of war. The Bill was opposed by some commercial men of eminence, on the ground that it interfered with the freedom of trade in securities for money; and, on technical legal grounds, by a Law Officer of the Crown, Sir Richard Bethell. But when the matter was brought to the attention of Lord Palmerston, he at once recognised the importance of the object in view, and said that commercial interests and legal difficulties must give way to political considerations. He observed that the arguments used with regard to freedom of trade in securities issued by an enemy reminded him of a practice attributed to the Dutch, who, though none carried on naval warfare with greater determination and vigour, would stop, as it was said, in the heat of an action, in order to sell gunpowder to the enemy. Owing to the support of Lord

Palmerston, the Bill was finally carried, in a somewhat altered form. The Act resulting from it recites that 'it is expedient to prevent, as much as possible, the 'Russian Government from raising funds for the pur- 'pose of prosecuting the war which it at present carries 'on against this country.' It enacts that 'if, during 'the continuance of hostilities between Her Majesty 'and the Emperor of Russia, any person within Her 'Majesty's dominions, or any British subject in any 'foreign country, shall wilfully or knowingly take, 'acquire, become possessed of or interested in, any 'Stocks, Funds, Scrip, Bonds, Debentures, or Securities 'for money which, since the 29th day of March, 1854, 'have or hath been, or which, during the continuance of 'hostilities as aforesaid, shall be, created, entered into, 'or secured by or in the name of the Government of 'Russia, or any person or persons on its behalf, every 'person so taking, acquiring, becoming possessed of, or 'interested in, any such Stocks, Funds, Scrip, Bonds, 'or Debentures as aforesaid, shall be guilty of a mis- 'demeanour.' It is also provided that nothing in the Act contained 'shall have the effect of reducing to a 'misdemeanour any such offence which, if this Act had 'not been passed, would amount to the crime of High 'Treason, or be deemed in any manner to alter or affect 'the Law relating to High Treason.'[1]

The Foreign Enlistment Act of 1870, repealing and superseding the earlier Act of the same name of 1819, owes its existence to the controversies with the

[1] 17 and 18 Vict. cap. 123. In the account of this Act I am largely indebted to the courtesy of Professor Birkbeck, of Cambridge, for the use of an unpublished paper of his on *The Promotion of Peace by Financial Action*, read at Bremen in 1876 before the Association for the Reform and Codification of the Law of Nations.

United States which arose out of the depredations of the *Alabama*; which had been built at Liverpool, if not with the connivance, yet certainly, as the United States Government urged, through the culpable negligence, of the British Government. In the course of the controversy, it became more and more clear that whereas, in former times, English interests were mostly coincident with those of belligerents, they were now becoming far more frequently identical with those of neutrals. Some such consciousness as this no doubt helped forward the settlement at Washington, in 1871, when a Treaty was signed between Great Britain and the United States, which contained rules imposing duties on neutral Governments of a far more stringent sort than Great Britain, at least, would probably have at any previous time assented to. The spirit of these rules, however, had been already recognised by Parliament, and embodied in the Foreign Enlistment Act of the previous year.[1] Besides following the general prohibitions of the Act of 1819 against illegal enlistment in the service of a foreign State at war with a friendly State, the Act of 1870 takes precautions of an entirely novel sort against illegal ship-building and expeditions. It provides that any person 'building, or agreeing to build, or causing 'to be built, or equipping or despatching any ship, with 'intent or knowledge, or having reasonable cause to 'believe, that the same shall or will be employed in the 'military or naval service of any foreign State at war 'with any friendly State' will bring himself within the penalties of the Act, unless he gives notice to the Secretary of State that he is building or equipping such a ship, and gives such security as the Secretary of State

[1] 33 and 34 Vict. cap. 90.

may prescribe, that the ship shall not be 'despatched, 'delivered, or removed without the licence of Her 'Majesty, until the termination of the war.' The Act also provides that where such a ship is so built for, delivered to the order of, paid for by, or employed in the military or naval service of, such foreign State, 'the 'burden shall be on the builder of such ship of proving 'that he did not know that the ship was intended to be 'so employed in the military or naval service of such 'foreign State.' Penalties are also imposed for the offences 'of adding to the number of guns, changing 'those on board for other guns, or otherwise increasing 'the warlike force of any ship which, at the time of 'her being within the dominions of Her Majesty, is in 'the military or naval service of a foreign State at war 'with any friendly State.'

It is sufficient just to notice, as a further instance of the activity of Parliament in facilitating procedure which owes its rise to transactions with foreign States, the Naval Prize Act of 1864.[1] Before the passing of this Act, a special Act used to be passed at the commencement of a war for the institution of Courts of Prize. The Court was a branch of the Court of Admiralty, but had a peculiar procedure of its own. As Lord Mansfield said of it, the Court was no more like the 'Court of Admiralty than it is to any Court in West-'minster Hall.'[2] The Act of 1864 makes the High Court of Admiralty and all its branches a permanent Court of Prize; and regulates, in a way somewhat, but not very, distinct from the former practice, the procedure in Prize cases.

[1] 27 and 28 Vict. c. 25.

[2] Lord Mansfield's judgment in Lindo *v.* Rodney and another, cited in Douglas' *Reports*, vol. ii. p. 594.

CHAPTER III.

THE CROWN.

SECTION I.—PERSONAL RELATIONS AND ATTRIBUTES.

IN any account of the English Constitution the topic of what is called, by a familiar abstract symbolism, 'the Crown,' must appear under two aspects,—that of its relation to the Legislature of which it forms a component part, and that of its relation to the Executive or Administrative Authority, of which it is the head. So far as the legislative aspect of the Crown is concerned, the topic is scarcely distinguishable from that of the powers and capacities of Parliament as a legislative body; and in fact the term Parliament strictly includes King or Queen, Lords and Commons, when these three several branches are regarded as harmoniously co-operating for legislative ends, and in no sort of provisional or hypothetical competition or conflict, existing between any one and another or the two others. In its executive or administrative aspect, on the other hand, the Crown must be regarded independently of Parliament as a legislative body; and in this aspect the personality of the Sovereign representing the Crown for the time being may unavoidably be placed in a certain sort of antithesis to the two deliberative Chambers of the

Lords and Commons. As the head of the Executive, the Sovereign is directly dependent upon the will of Parliament. But this is only so in the last resort; and it may well happen that, through the working of Governmental procedure, not only is the Executive removed for long intervals from the control of the two Houses of the Legislature, but the head of the Executive, through its agents, may have such an amount of initiating faculty habitually conceded to it that it becomes difficult, if not impossible, to determine the limits within which the rights and claims of the two Houses of Parliament theoretically confine it. The true position of the Monarch in any European country at the present moment can only be ascertained by reference to the historical circumstances amidst which the institution of monarchy originally grew up in any particular country, and has since been modified in that country. The attributes of the Monarch have in only a few cases,—and those where the Constitution is new and as yet scarcely tried,—been invented for the purpose of attaining distinctly acknowledged political ends. In the oldest monarchy and that with the least broken, and therefore most characteristic, history—that of England, the Monarch simply retains to the full all the attributes, capacities, functions and dignity which revolutions and silent constitutional changes have not taken away. How much remains is an arduous question enough, and one upon which it will be seen further on that modern controversies are throwing much light. In the meantime, it may be said that in many respects the English monarchy has been of late years, in outward form at least, hedged, protected, and even magnified by legislation, rather than infringed and diminished. That

this is so is manifest from the pains which have been taken from the time of the accession of William IV.:—

1, to prevent all possible perplexities in the matter of providing for a regency:

2, to determine and particularise the proper designation of the occupant of the Throne:

3, to adjust the Royal income and make a satisfactory and just provision in the case of Royal marriages:

4, to protect the Royal household against interference from purely political quarters:

5, to determine and regulate from time to time the position and constitutional functions of the Royal Consort.

1. There are a variety of distinct cases in which a provision has to be made for securing the discharge of at least some of the formal duties of the occupant of the Throne when, by reason of infancy, disease, absence, or other like event, the occupant is personally unable to discharge them. When the occurrence of the event, as probable or possible, can be clearly foreseen at a distance, and time is thus afforded for a deliberate arrangement, there is little difficulty in making a provision which shall insure the satisfactory fulfilment of the duties called for, without violating to a greater extent than necessary the routine and usages of the Constitution which are familiar to the public eye. But when a sudden and calamitous accident befals the occupant of the Throne, as in the case of the repeated illnesses of George III., it is not surprising that the pressure of the crisis affords to contesting parties opportunities for advocating all sorts of theoretical rights and practical measures dictated by motives not always regulated by a pure and simple desire to maintain in the most

effectual way the easy working of the Constitution. Should calamities resembling those which afflicted George III. again assail an occupant of the Throne, though it is probable that much deference would be paid to the precedents of that reign, yet the hap-hazard and precipitate measures resorted to for providing for the discharge of the regal functions during the illness of the King will not probably be servilely followed without reopening afresh the question of claims and rights, looked at in the view, not only of the actual emergency, but of the personality of those on whose behalf they may be urged.

The principles for determining the question of a regency since the accession of William IV. have not been of an abstract character, but have in each case been laid down with reference to the actual circumstances of the case legislated for. The three cases legislated for since the accession of William IV. were, (1) the death of the King in the minority of the Princess Victoria; (2) the death of her present Majesty while her successor (the King of Hanover) was out of the realm; (3) the death of her present Majesty before any child of hers, being her successor, had reached the age of eighteen.

In the first case (1) the provision was that the Duchess of Kent should be sole Regent, uncontrolled by any Council other than the ordinary responsible Ministers of the Crown.[1] In the second case, (2) that of providing for the absence from the realm of her Majesty's successor at the time of her decease, a precedent of Queen Anne's reign was followed, by which the administration of the government was to be com-

[1] 1 Will. IV. cap. 2.

mitted to 'Lords Justices' until the King's arrival.[1] In the third case (3) in the event of any child of Her Majesty succeeding to the throne before the age of eighteen, Prince Albert, as the surviving parent, was to be Regent, without any limitation upon the exercise of the Royal prerogatives,—except an incapacity to assent to any Bill for altering the succession to the Throne, or affecting the uniformity of worship in the Church of England, or the rights of the Church of Scotland.[2] The attainment of full age on the part of several of Her Majesty's children, and the death of Prince Albert, have combined to render this statute obsolete; and during the joint lives of her present Majesty and the Prince of Wales no necessity can arise for a fresh Regency Act. In the event of the decease of either Her Majesty or the Prince of Wales before the child of the Prince of Wales who would first succeed him has attained the age of eighteen years, a Regency Act would be called for.

2. It may have been perhaps owing to an accidental convergence of political events that attention was called in a late Session of Parliament to the constitutional importance believed in some quarters to attach to the proper designation of the English Monarch. On the occasion of the passing of the 'Act to enable Her 'Most Gracious Majesty to make an addition to the 'Royal Style and Titles appertaining to the Imperial 'Crown of the United Kingdom and its Dependencies,'[3] by the force of which the Queen was enabled to assume in India the title of Empress of India, a parliamentary debate took place of some constitutional interest, as

[1] 6 Anne, cap. 7; 7 Will. IV.; 1 Vict. cap. 72.
[2] 3 and 4 Vict. cap. 22.
[3] 39 and 40 Vict. c. 10.

expounding the method by which the Royal style and title could be altered, and the nature of the rival claims which might be asserted on behalf of the Houses of Parliament on the one hand, and of the Crown on the other, to take the initiative in the matter. In the Queen's Speech of the 17th of February, 1876,[1] after reference had been made to the Prince of Wales's journey to India, and 'the hearty affection' with which he was received by the Queen's Indian subjects, the following passage occurred: 'At the time that the 'direct government of my Indian Empire was trans-'ferred to the Crown, no formal addition was made to the 'style and titles of the Sovereign. I have deemed the 'present a fitting opportunity for supplying this omis-'sion, and a Bill upon the subject will be presented to 'you.' The same evening Mr. Disraeli, then Prime Minister, announced that he had 'to ask the House to-'night to introduce a Bill which consists of only one 'clause, which will enable Her Majesty, by Proclama-'tion, to make that addition to her style and titles 'which befits the occasion.' Mr. Disraeli went on to quote the precedent of the Act of Union with Ireland, which Act contained a proviso enabling the Sovereign to announce by Proclamation under the Great Seal the style and title he would assume; in accordance with which proviso King George III. issued a proclama-tion under the Great Seal, and adopted the title of 'King of the United Kingdom of Great Britain and 'Ireland and its Dependencies.' 'I have to ask the 'House to-night' (said Mr. Disraeli), 'to give me leave 'to bring in a Bill which will enable Her Majesty to 'exercise her high prerogative, and to proclaim the

[1] *Hansard*, vol. ccxxvii. 408.

'addition to her style and title which she deems ex-
'pedient and proper.' A somewhat vehement debate ensued, in the course of which it was argued that the House was entitled to know the nature of the style and title to be assumed before the Bill was passed. Mr. Disraeli resented this argument, and replied that if he gave the information which was required, 'we shall 'not pass a Bill enabling Her Majesty to use and 'assume a title which she thinks expedient, but that on 'the contrary we shall be binding Her Majesty down to 'use only that one we shall have passed. . . . . It would 'be an invasion of the just prerogative of the Crown, 'which certainly ought not to be rudely touched.' Whether in consequence of the expression of opinion in Parliament, or from a reconsideration of the constitutional question at issue, Mr. Disraeli retreated from this position on the Bill being brought forward for its second reading. By means of a protracted and curious exhibition of antiquarian learning, he intimated that the new title to be assumed was that of Empress of India; and though this title was on a variety of grounds,—etymological, historical, political, social, and moral,—assailed with caustic criticism from various parts of the House, the Bill finally became law.

The only comment that need be made upon this incident, as marking an era of constitutional significance, is that it shows that the Houses of Parliament still continue firm in their claim, as predominantly asserted at the time of the passing of the Bill of Rights and the Act of Settlement, to oblige the Crown to draw all its dignity, as well as its powers, from Statute or Common Law, not from unascertained custom, and still less from occasional or capricious assumptions.

3. The value of the policy of separating the personal income and expenses of the occupant of the Throne from the revenue and expenditure which is properly of a public rather than a personal character has been recognised from the time of the Restoration, and is recommended by very obvious considerations, as well as fortified by experience often of a distressing kind. So long as the personal and public income and expenses of the Crown were commingled, it was impossible for Parliament to apply an adequate check to an uncontrolled exercise of the Royal prerogative in certain directions, and it was also productive of occasional hardship to the Monarch, so often as an accidental excess in the public claims reduced the amount of money available for his private necessities. The story of the Civil List from the time of Charles the Second to that of its final settlement in the present reign is that of a series of partial and tentative efforts on the part of Parliament to substitute a definite grant of money to the Crown for certain portions of its hereditary revenues, and therewith to charge those revenues with expenses which had heretofore been payable out of the general fund at the disposal of the Crown. The settlement on the accession of King William IV. at last inaugurated a system of more decisive action in this matter than Parliament had as yet ventured upon. For the first time, the King surrendered the interest of the Crown in the sources of public revenue which yet remained to it, and accepted in its stead a Civil List of 435,000*l.* The future expenditure of this amount was divided into five different classes, to each of which a specific annual sum was appropriated, including 75,000*l.* for pensions. The

Civil List was at the same time relieved from a number of public charges, such as judicial salaries, and the salaries and pensions of the diplomatic service.[1] The Act provided that the hereditary revenues were, with a few exceptions, to be carried to the Consolidated Fund, —a Fund originally created by the Act of the 27th Geo. III. cap. 47, by which various duties and taxes were to be 'carried to and constitute a Fund to be 'called the Consolidated Fund.' It may be noticed here that Mr. Gladstone, in his comments on Mr. Martin's 'Life of the Prince Consort,' has incidentally thrown some doubt on the permanent validity of any such settlement of the hereditary revenues of the Crown. The passage may be here cited, though the point raised is at present too purely problematical to need further discussion.

'There is, indeed, one genuine Crown right which 'has been somewhat disparaged of late years, and that 'is its title to the Crown Lands. By degrees, it be-'came the custom for the Sovereign, on accession, to 'surrender the life-interest in these properties to the 'State, in return for a life-income called the Civil List. 'But this transaction in no way affected the legal right 'of the next heir to resume the lands on the expiry of 'the arrangement. It is undeniable that members of 'Oppositions, and the blamable connivances of party, 'have of late years, in various instances, obtained by 'pressure from the Governments of the day arrange-'ments which touch the reversionary interest. The 'question is too complex and many-sided for exposition 'here; but it may be said with truth, first, that the

[1] 1 Will. IV. cap. 25.

'State has dealt liberally as a tenant under a life-lease 'with the estates given to its control; and, secondly, 'that the subject is in a constitutional view a small 'one.'[1]

This may, however, be a convenient place to notice that the legal position of the Sovereign towards the Crown estates, as contrasted with his position towards what are known as his private estates, has very recently been matter of Parliamentary discussion and legislation. An Act, called the Crown Private Estates Act, was passed in the year 1862, and a supplementary Act, for the purpose of explaining and amending the former one, in 1873, which had for their general purpose the relieving of the Sovereign from some disabilities which might in law be held to attach to his dealings with his private property, in the same way as they did attach to his dealings with the Crown estates. On the first of these Acts being read a second time in the House of Lords, on July 4, 1862, the Lord Chancellor explained that, down to Queen Anne's time, the Sovereign had unlimited power of disposition in reference to Crown lands; but in the first year of that reign an Act was passed limiting the power of the Crown to granting leases for thirty years or for three lives. The operation of that Statute, however, was confined to England. An Act of the 39th and 40th of George III. gave full powers to the Crown to deal with estates acquired by means of the private property of the Sovereign; and by an Act of the 1st and 2nd of the present reign, the restricting provisions of the Statute of Anne were extended to estates of the Crown in Scotland and Ireland. Acciden-

[1] *Gleanings of Past Years*, by the Right Hon. W. E. Gladstone, vol. i. p. 82. 1879.

tally, it happened that the extended capacity conferred by the Act of George III.'s reign was omitted from the Statute of Victoria; and the result was, that private estates of the Sovereign in Scotland or Ireland would not come within the provisions of the Act of George III., but would fall under the restrictions of the Statute of Anne. The Crown was consequently unable to deal with land in Scotland or Ireland acquired by the private property of the Sovereign. The intention of the Act of 1862 was to give to the Sovereign the same right over his private estates in Scotland which the Act of George III. had given in reference to those in England; and to provide that any such estates held by the Crown should be owned in the same way as if they were held by subjects of the Crown. The only comment made in the House was made by the Marquis of Bath, who objected that the provision of the Bill which subjected the private estates of the Crown to all rates and taxes was unconstitutional.[1] When, on June 30, 1873, the Lord Chancellor moved the second reading of the explanatory and amending Act,[2] he said that 'its principal object was to make it clear that Her 'Majesty or any future Sovereign should have the 'power of transmitting her private estates to any 'member of the illustrious family that now ruled this 'country; and that they should continue private estates 'in the event of the person who held them succeeding 'to the Crown.' On the second reading being moved in the House of Commons on July 21, Mr. Gladstone, then Prime Minister, said that some misapprehension

[1] *Hansard*, vol. clxvii. 1412. Also 25 and 26 Vict. cap. 37.
[2] *Hansard*, vol. ccxvi. 1550.

had arisen as to the character of the Bill, which did not aim at altering the law, but at removing difficulties which had arisen with regard to its present effect. Mr. Anderson had given notice of an amendment 'that it is 'inexpedient to extend the scope of the Act of the 25th 'and 26th Victoria, chapter 37, until the secresy at 'present attaching exclusively to Crown testaments is 'abolished.' Mr. Gladstone urged that the question of secresy could be best argued on its own merits, and ought not to confuse the present discussion,—or Mr. Anderson might bring forward his proposal in Committee. If Lord Westbury's opinion were correct (said Mr. Gladstone), the Sovereign might, under the Act of George III. and that of Victoria, bequeath to the Heir of the Crown landed as well as other property; but there were doubts abroad which ought to be set at rest. He did not see any advantage in private landed property lapsing into the mass of the Crown Estates. He held that no danger need be apprehended from an excessive accumulation of property in the hands of the Sovereign. If any such existed, the House had an opportunity of considering the Sovereign's position at the beginning of each reign. Mr. Anderson moved his Amendment, stating that the theory of the Constitution was, that the Crown should depend entirely upon Parliament, and therefore provisions were granted for younger children. The Civil List was supposed to make liberal allowance for maintaining the dignity of the Crown. The Solicitor-General explained that there was no doubt the Queen might now dispose of landed property in favour of the Prince of Wales. The question was, would the Prince, if he became King, be free to alienate such estates? This point the Bill was intended to settle.

No wills of real estate required probate; they might always be kept secret, if separate from wills disposing of personalty.[1]

The treatment of the topic of the recent legislation respecting the Crown Lands would not be complete without some notice being taken of the Act of 1852 (15 and 16 Vict. cap. 39), which was passed to remove doubts as to the lands and casual revenues of the Crown in the Colonies and foreign possessions of Her Majesty. The Act recites that, from the time of the passing of the Act 1 William IV. cap. 25, the lands of the Crown in the Colonies have been granted and disposed of, and the moneys arising therefrom have been appropriated, by the authority of the Crown and of the Legislatures of the several Colonies, as if the said Act, and another Act (1 Vict. cap. 2), had not been passed, and that doubts have arisen whether such moneys might not be considered 'hereditary casual revenues' of the Crown, within the meaning of the said Act; and it enacts that the provisions of the said Acts shall not extend to such moneys, nor to any sale or disposition of such lands, nor to any appropriation of such moneys; and that nothing in the said Acts shall prevent the appropriation of any casual revenues in the Colonies or foreign possessions of the Crown towards public Colonial purposes, provided that the surplus not applied to such public purposes shall be carried to, and form part of, the Consolidated Fund.

The Civil List of her present Majesty was settled on the same principles as that of William IV., but at a rather lower rate; and amounted to 385,000*l.*

[1] *Hansard*, vol. ccxvii. 619.

In his life of Lord Melbourne, Mr. McCullagh Torrens, referring to the time of the Queen's accession, says that 'many letters [of Lord Melbourne's] at this 'period relate to the details of the Civil List which the 'new Parliament would be asked to vote on its reas- 'sembling. The First Lord of the Treasury [Lord 'Melbourne] sifted every detail thoroughly of the ex- 'penditure in former reigns, and weighed for himself 'the comparative circumstances in past and present 'times which required or justified deviation from pre- 'cedent. Lord Spencer, who was consulted on the 'subject as the highest economic authority among the 'Whigs, wrote unreservedly recommending that the 'new establishment should be formed on a generous and ungrudging scale. Engaged himself in applying 'principles almost of parsimony to the retrieving of his 'family estates from embarrassment, he saw the political 'wisdom of leading the nation to confide at the outset 'of the new reign in their youthful sovereign, and the 'policy as well as propriety of providing such an income 'as would take away all excuse in future for the con- 'tracting of Royal debt. Fortified by such authority, 'and completely master of the history of the subject, 'Melbourne made up his mind to propose to Parliament 'a provision for Her Majesty considerably larger than 'that which had been agreed to in the previous reign. 'And he prayed Spring Rice [the Chancellor of the 'Exchequer] when the Cabinet met in November [1837] '"to come prepared to act boldly and liberally, and '"by no means to fiddle upon small points and about '"petty salaries," and so it was done accordingly.'[1]

[1] *Memoirs of the Rt. Hon. William, second Viscount Melbourne.* By W. M. Torrens, M.P., vol. ii. p. 244.

The chief variation between the new Civil List and that of Her Majesty's predecessor was, that in lieu of the pension-list of 75,000*l.*, Her Majesty was empowered to grant pensions annually to the extent of 1,200*l.* The revenues of the Kingdom of Hanover were at this time finally detached from the revenue of the English Crown. But the reigning Sovereign still retains the revenue of the Duchy of Lancaster, and the Prince of Wales that of the Duchy of Cornwall.

Mr. McCullagh Torrens notices, in his life of Lord Melbourne, that a project was prepared at the Treasury, upon the accession of the Queen, for the reform and better management of the Crown estates in Lancashire and Cornwall; but that the Premier, Lord Melbourne, writing on August 30, 1837, expressed his hesitation in the following terms: 'The question of the Duchies is a 'very material one, and one of great delicacy, and which 'appears to me to require to be treated with much 'caution. It is very material in itself, and as far as 'it relates to the administration of the property. 'Wherever you meddle with these ancient rights and 'jurisdictions, it appears to me that, for the sake of 'remedying a few comparatively insignificant abuses, 'you create many new inconveniences, and always 'produce considerable discontent. But the general 'question appears to me still more important when 'considered with reference to the present House of 'Commons, and the tone and temper of the elections.' He then goes on to point out that public opinion does make a progress, but it is not 'by a steady onward 'course'; and that as the effect of the Church-rate measure of the Government had been to raise a strong and effectual Church cry, so they must take care they

did not add a Prerogative cry. 'The Church alone is 'nearly too much for us; Church and Crown would be 'so at once.' 'The fault of our Church-rate measure 'was, that the grievance to be removed was one almost 'entirely of principle. It was in very few places a real 'burthen. The same is still more true of the Duchies: 'few except their inhabitants know of their existence, 'and none feel any inconvenience from them, or would 'receive any benefit from their reformation.'[1] It is perhaps superfluous to add that the reform of these Duchies ultimately came from within, through the energy and prudent management of the late Prince Consort.

With respect to the management of the land revenues of the Crown generally, gross abuses had, from the early days of the reign of George III., been noticed and exposed. Mr. Burke, indeed, suggested a general sale of the Crown Lands; and in consequence of a Commission appointed by an Act of Parliament, in pursuance of a recommendation of Mr. Pitt's in 1786, the management of the estates was so much improved that whereas, for the first twenty-five years of the reign of George III., they produced an average net revenue little exceeding 6,000*l.* a year, they now produce an income of over 400,000*l.* a year. It still remained, however, to apply a remedy to the abuse by which the revenue of the Crown Lands, as it fell in, was applied to the execution of public works and improvements without any parliamentary check being interposed, and without the Exchequer being punctually repaid the price due to it in compensation of the Civil List. To arrest these evils

[1] *Memoirs of Viscount Melbourne*, vol. i. p. 238.

an Act was passed in 1851,[1] by which the Department of Woods and Forests,—constituted by an Act of the year 1810,[2]—was separated from the Department of Public Works, with which in 1832 it had by an Act of Parliament been combined.[3] The pension list to which it has been seen that Her Majesty has consented to confine herself is now regulated in conformity with a resolution of the House of Commons of February 18, 1834, which would restrict the grant of pensions 'to such 'persons as have just claims on the royal beneficence, 'or who, by their personal services to the Crown, by 'the performance of duties to the public, or by their 'useful discoveries in science, and attainments in literature and the arts, have merited the gracious consideration of their Sovereign, and the gratitude of their 'country.'

When, on the Queen's accession, the Government proposed a grant of 30,000*l.* a year to the Duchess of Kent, Lord Brougham denounced the amount as extravagant; and Mr. Torrens, in his 'Life of Lord Melbourne,' records the curious incident that Lord Brougham designated the Duchess as 'the Queen-Mother.' Lord Melbourne corrected him by interjaculating 'the Mother of the Queen.' 'Stung at being caught 'in a blunder, and glad of an excuse for assailing his 'courtly foe, Brougham fiercely rejoined, saying, among 'other things, "the tongue of my noble friend is so '"well hung, and so well attuned to courtly airs, that I '"cannot compete with him for the prize which he is '"now so eagerly struggling to win. Not being given to

[1] 14 and 15 Vict. cap. 41.
[2] 50 Geo. III. cap. 65.
[3] 2 and 3 Will. IV. cap. 1.

‘ “ glozing and flattering, I may say that the Duchess
‘ “ of Kent (whether to be called Queen-Mother or
‘ “ Mother of the Queen) is nearly connected with the
‘ “ Throne; and a plain man like myself, having no
‘ “ motive but to do my duty, may be permitted to
‘ “ surmise that any additional provision for her might
‘ “ possibly come from the Civil List which you have
‘ “ so lavishly voted.” ’ Mr. Torrens adds that the Premier repelled this attack by reminding the House of a not unimportant difference between the Queen dowager, and a Princess who had never worn the Crown. ‘ What was meant by attributing to him a tongue well ‘ hung, he could not tell; but one more skilful in egre- ‘ gious flattery than that of the noble and learned lord ‘ he had never known.’ [1]

It is perhaps worth noticing as a matter of constitutional formality, that on the 6th of June, 1838, Mr. Gillon moved in the House of Commons ‘ that an humble ‘ address be presented to Her Majesty, praying that she ‘ would take into her gracious consideration the parlia- ‘ mentary allowance hitherto and at present enjoyed by ‘ His Royal Highness the Duke of Sussex, as compared ‘ with those enjoyed by the other members of the Royal ‘ Family, with a view to recommend some addition to ‘ it.’ Mr. Gillon stated that the Duke’s income was 6,000*l.* less than that provided for other members of his family similarly circumstanced; and that His Royal Highness was at the head of seventy scientific and literary bodies and charitable institutions. Lord John Russell, Home Secretary in Lord Melbourne’s Government, opposed the motion, on the ground that it could

[1] *Life of Lord Melbourne*, vol. ii. p. 246.

only originate in a message from the Sovereign. Sir Robert Peel took the same view of the question, and, on a division, the previous question was carried by 98 against 48, the motion being therefore lost.

On the marriage of Prince Arthur, Duke of Connaught, the third son of the Queen, in the course of the consideration by the House of Commons of the Royal message with reference to making provision for his establishment, the whole principle and modern practice which regulates the relations of Parliament to the Sovereign in respect of his personal expenditure were incidentally examined and discussed. Inasmuch as the Government of the day,—led in the House of Commons by Sir Stafford Northcote, Chancellor of the Exchequer, —and Mr. Gladstone, who was for some years Prime Minister in the previous Government, which was now in Opposition, were entirely at one on all points susceptible of controversy, there is no doubt that this discussion will supply the materials of the basis upon which all future similar arrangements will be founded, or from which they will proceed as a fresh starting-point. It is therefore worth while to recall the more essential parts of the debate in some detail.

'On the motion that the Speaker leave the chair in 'order that the House should, in Committee, consider 'the Royal message with reference to the proposed 'marriage of His Royal Highness the Duke of Con- 'naught, Sir Charles Dilke rose to move as an amend- 'ment, "That the consideration of Her Majesty's most '"gracious message be deferred until there be laid be- '"fore this House a return showing the Princes and '"Princesses of the Blood Royal, being members of '"the Royal Family of England, but excluding the

'"Sovereign for the time being, and Queens consort '"or dowager, from the accession of His most Gracious '"Majesty King William III. to the present time, '"specifying with regard to such of them as succeeded '"to the Throne the date of such accession, and with '"regard to such of them as contracted marriages with '"the consent of the Sovereign for the time being, the '"date of each marriage, and also showing separately, '"with regard to every Prince or Princess, the several '"applications (if any) made to Parliament for grants '"or confirmation of grants out of the public revenues, '"and the results of such applications, adding in each '"case a copy of the Royal message by which such ap-'"plication was made."'

In the course of his speech in reply, the Chancellor of the Exchequer said:

'The House must bear in mind that in all these 'matters there has been, as has been frequently stated, 'something in the nature of a bargain between the 'Crown and the Parliament, by which the Crown sur-'rendered various hereditary revenues and Crown Lands 'to the public service, in exchange receiving the fixed 'sums which have been granted; and undoubtedly, 'upon comparison of what the Crown might have re-'ceived and the amount it did receive, it is not the Crown, but the nation which has been the gainer. 'That is shown by an interesting return, known to 'many members, moved for at the commencement of 'the present reign. At that time Sir Robert Inglis 'moved for a return showing what would be the result 'between 1762 and 1837, and it was found that the 'amount of the hereditary revenues which passed to the 'nation was 116,000,000*l.*, whereas the amount of the

'Civil List during the same period was 69,000,000*l.*, 'showing 47,000,000*l.* going to the nation at that time. 'Since then, undoubtedly, the public revenues from 'Crown Lands have largely increased.'

Mr. Gladstone, in the course of his remarks, observed:

'If Her Majesty were, in her own personal capacity, 'among the great proprietors of the Kingdom, I should 'be the last person to deny that the House ought to be 'cognizant of the amounts proceeding from sources of 'that character before it made an addition to the burdens of the people for the support of the Royal Family. 'But, although we have no formal and definite information upon that subject, we know perfectly well that 'neither of these statements is based on fact. Whatever ground you may take upon this measure, I defy 'any one to say that any adequate provision is made 'for members of the Royal Family by means of any 'separate emoluments attaching to them professionally 'or otherwise, or to say that it is possible for Her 'Majesty to make even the meanest and most limited 'provision for them out of the means which she possesses. Therefore, however good this information 'might be, it does not really bear upon the question 'before the House, which has to perform on the present 'occasion one of its most delicate and difficult duties. 'All the circumstances have been radically altered since 'the accession of William IV. When that Sovereign 'ascended the throne, entirely new principles were 'adopted with regard to Royal expenditure, and adopted, as I think, in a way which tended very greatly to 'the advantage of the public. Before that time large 'sums of money had been placed in the hands of the

'Sovereign without a very minute investigation of the 'purposes to which they were to be applied. Many 'public charges were up to that time included in the 'Civil List, but, after deducting these charges, a much 'larger sum remained available for the Sovereign than 'was granted on the accession of William IV., and a 'very much larger sum than was granted to her present 'Majesty when she ascended the throne. I must also 'point out that, during the time when these larger sums 'were granted, applications which greatly offended and 'scandalised the country, and weakened the foundations 'of Royalty itself, were from time to time made to 'Parliament for grants of money to discharge debts 'which had accumulated upon the Civil List and which 'the Sovereign was not in a position to discharge. The 'great object of the new arrangement was to get rid of 'all applications of the same kind in future. It was 'not a matter of very great consequence to the people 'or the Parliament to know whether 20,000*l.* or 30,000*l.* 'a year more or less were expended in maintaining the 'dignity of the Monarchy; what was important was 'that they should know what they had to pay, and that 'the Sovereign should not be put in the unworthy and 'humiliating position of accumulating pecuniary ob- 'ligations he could not discharge, and then having to 'come *in formâ pauperis*,—as a mendicant, in fact,— 'to the door of the House of Commons to ask for the 'discharge of his debts. That great object has been 'completely gained, and gained by Parliament acting 'on the principle of ministering to the wants of the 'Sovereign upon a fair and liberal scale, adequate to 'the grandeur of the monarchy; but, at the same time, 'with strict reference to the purposes in view and to the

'actual circumstances of the Royal Family from time 'to time. The question arose as to the sources from 'which the wants of the younger members of the Royal 'Family should be supplied. They were not in a con- 'dition of life, however assiduously they might apply 'themselves to public duties, to earn a living for them- 'selves. Neither their position, nor their traditions, 'nor the opinion of the people would allow the Royal 'Family to become what are called self-supporting 'members of the community. The allowances granted 'to Her Majesty have not been made on such a scale as 'to permit her either with facility or propriety so to 'reduce her own expenditure as to make becoming pro- 'vision for the wants of the younger branches of the 'Royal Family. Whence, then, is that provision to 'come? I think the common sense of the case will 'show that the intention of Parliament was and is to 'minister to the requirements, even of the Sovereign, 'only in such a way as to meet the circumstances of 'the day, and to keep in its own hands the means of 'judging of future exigencies as they arise. This is 'shown by the fact that the Civil List of William IV. 'was fixed at 435,000*l.* a year, and that of Queen 'Victoria on her accession at 385,000*l.*—and I may 'add that in the present reign Her Majesty pays in- 'come-tax on the amount which is granted to her. The reason for this difference of 50,000*l.* a year is that at 'the accession of William IV. there was a fully de- 'veloped expenditure, because there was a Monarch 'and a Queen Consort; when Queen Victoria acceded 'there was no Prince Consort. As soon as Her Majesty 'happily married, an application was of course made to 'Parliament for an increased grant. This, I think,

'clearly proves the main proposition that Parliament 'keeps in its own hands the power of judging according 'to varying circumstances and deciding accordingly. 'The only question that remains, then, is as to whether 'the arrangements which have been made are fair and 'reasonable. I do not think my hon. friend will stand 'out upon so small a point in an affair of the kind as 'to persist in his demand for information, which, how-'ever reasonable in principle, is a very separate affair 'with regard to the subject of which we have now to 'judge. There can be no doubt that from no source 'other than the votes of Parliament can the money 'necessary for the purposes I have mentioned be ob-'tained. The practice has had the approval of a num-'ber of successive Governments and Parliaments. The 'first was during the first Ministry of Lord Palmerston, 'on the occasion of the marriage of the Crown Princess. 'From that time forward it was necessary to make ap-'plication for one and another member of the Royal 'Family, and on every occasion when the application 'was made it has been answered in the most loyal and 'becoming manner. I hold that the basis of the present 'system is essentially a popular one, because it pre-'serves to Parliament the power of judging in each 'case as it arises; it strengthens the control of Her 'Majesty over the members of the Royal Family, and 'leaves to Parliament a full consideration of all the 'circumstances of every case. The complaint of my 'hon. friend is, not that a provision is made, but that 'an additional provision is made for marriage. Now, 'that is the very thing I am anxious to preserve, as an 'original adviser of the arrangement made in 1862, 'of which it was an essential part. It is infinitely

'better on every ground that a provision should be 'made attaching to the condition of a young Prince or 'Princess in single life, and that a new provision should 'be made for married life. Therefore, I give my full 'and entire adhesion to the proposal of Her Majesty's 'Government.'

The following is the form of the resolutions adopted by the House:

'That the annual sum of 10,000*l.* be granted to 'Her Majesty, out of the Consolidated Fund of Great 'Britain and Ireland, towards providing for the esta- 'blishment of His Royal Highness the Duke of Con- 'naught and of Strathearn and Her Royal Highness 'Princess Louise Margaret Alexandra Victoria Agnes 'of Prussia, the said annuity to be settled on His Royal 'Highness for his life, in such manner as Her Majesty 'shall think proper, and to commence from the day of 'the marriage of their Royal Highnesses, such annuity 'to be in addition to the annuity now enjoyed by His 'Royal Highness under the Act of the 35th year of Her 'present Majesty.

'That Her Majesty be enabled to secure to Her 'Royal Highness Princess Louise Margaret Alexandra 'Victoria Agnes, in case she shall survive his Royal 'Highness the Duke of Connaught and Strathearn, an 'annual sum not exceeding 6,000*l.* during her life, to 'support her Royal dignity.'[1]

4. It is so long since the organisation of the Royal Household has presented any political or constitutional problem that the modern reader may well experience a difficulty in understanding how, in 1839, the leader of a great political party, Sir Robert Peel, could have

[1] *The Times*, Friday, July 26, 1878.

declined to take office, and prolonged for two years the *régime* of his opponents, solely because the Queen refused to remove certain ladies of her bedchamber who had been appointed by the Government he was called upon to supersede. The whole affair has been dwelt upon from so many points of view (including that presented by Mr. Disraeli in his novel of 'Coningsby'), that there is little now to be said about it, except to notice the necessity and the difficulty which the Constitution experiences in providing for the Sovereign a sanctum of personal liberty, while guarding against the introduction at Court of influences which, however feeble in the case of a mature and experienced Sovereign, might be omnipotent in the case of one just called to the throne; and which might afford, as some of the worst periods of English history abundantly demonstrate, a dangerous and chronic counterpoise to the counsels of the constitutional advisers of the Crown. The whole transaction can be best understood in the light of the circumstances in which the Royal Household was originally constituted at the time of the Queen's accession; and it would appear that the arrangements were carefully made by concert between Lord Melbourne, the Prime Minister, and Lord Lansdowne, the President of the Council. Mr. Torrens quotes the following interesting letter, addressed by Lord Melbourne to Lord Lansdowne on the 22nd of June, 1837: 'It is very necessary that 'some of the situations in the Queen's household, such 'as some of her ladies, and the Privy Purse, should 'be settled without further delay. It appears by 'Chamberlayne's "Present State of England," which is 'the only authority we can as yet find upon the subject, 'that Queen Anne had a Privy Purse, a Groom of the

'Stole, a first Lady of the Bedchamber, and ten other 'ladies of the Bedchamber. The Queen thinks that 'such an establishment of ladies would at present be 'unnecessarily large, and she is disposed to think that 'the establishment of Queen Consort would be sufficient 'for her, viz., one Mistress of the Robes, and six Ladies 'in Waiting. I told her what you desired me upon 'the part of Lady Lansdowne, and she was much grati-'fied by it. If Lady Lansdowne thinks herself not 'equal in point of health to be the Mistress of the 'Robes, could she in the first instance take that of the 'first Lady in Waiting, with the understanding that 'she should be allowed to spare herself; for instance, 'some other lady might be got to take the waitings at 'the first drawing rooms?'

In a letter written the next day, Lord Melbourne says: 'I saw the Queen last night, and the arrange-'ment which she seems to approve is, that if Lady 'Lansdowne will take the situation of first Lady in 'Waiting, with the understanding that she is not to 'give any formal attendance, she would then appoint a 'Mistress of the Robes, a first Lady in Waiting, and 'six other ladies for the ordinary duty. She is desirous 'that the Duchess of Sutherland should be the Mistress 'of the Robes if she will undertake it. Lady Tavistock 'will be one of her ladies,—Lady Rosebery, I am sorry 'to say, declines. If this arrangement will suit Lady 'Lansdowne, I will write to the Duchess of Sutherland.'

It has been in some quarters suspected that the Queen's refusal to make the changes in her Household required by Sir Robert Peel proceeded from the advice of Lord Melbourne and the outgoing Cabinet, while the demand to make the change proceeded as much from

the Duke of Wellington as from Sir Robert Peel himself, so that the whole affair was in essence a mere party conflict outside the walls of Parliament. But Mr. Torrens, in his 'Life of Lord Melbourne,' calls attention to Lord Melbourne's speech in the House of Lords, in which he justified his conduct and repudiated most distinctly all share in advising Her Majesty as to her treatment of Sir Robert Peel's demand. In the course of his speech Lord Melbourne said: 'It is a bad thing to have 'nothing to oppose to charges and imputations of this 'kind, but one's own mere personal assertion. But when 'I parted with Her Majesty on the morning of Wednes-'day last, I thought it my duty to tender such advice 'as I gave her with respect to the persons to whom she 'ought to apply, and to the course which it was incum-'bent on her to follow. I thought it, I say, my duty 'to tender such advice to Her Majesty, considering the 'novelty and difficulty in which she was placed. But 'I most distinctly assure your Lordships,—not using 'any asseverations or protestations; for mere asse-'verations and protestations might possibly produce on 'the minds of your Lordships the same effect which 'they would produce on mine, and might rather in-'duce a doubt of the veracity of the party using them. 'But I most distinctly assure you, that as to the ladies 'of the household I gave Her Majesty no advice what-'ever; for I fairly declare to you, my Lords, that I did 'not expect, that I did not anticipate, I could not con-'ceive that this proposition could be made. There are 'many reasons why this proposition should not be made 'to Her Majesty. They are so obvious that I need not 'particularise them.'[1]

[1] *Memoirs of Lord Melbourne*, vol. ii. pp. 303, 304.

Mr. Gladstone, in his lately republished criticism of Mr. Martin's first volume,[1] says that the record of the transaction given in 'Hansard' rests mainly upon two letters, one from the Queen, and the other from Sir Robert Peel; and these two letters do not fully harmonise in their representation of the facts. The Queen in her letter mentions and refuses the proposal of Sir Robert Peel 'to remove the ladies of her bedchamber.' Sir Robert Peel, in his answer, speaks only of his desire to remove a portion of them. The Queen's letter is as follows: 'The Queen, having considered the proposal 'made to her yesterday by Sir Robert Peel, to remove 'the ladies of her bedchamber, cannot consent to adopt 'a course which she conceives to be contrary to usage, 'and which is repugnant to her feelings.' Mr. Gladstone says that 'it is very difficult to understand why 'Sir Robert Peel did not dispel, if only for his own 'sake, the misapprehension under which the Queen's 'letter may have been written. At present the documentary evidence only shows that Her Majesty refused 'an unreasonable demand; and that he retired from 'his high position because he adhered to a demand 'which, whether necessary or not, was not unreasonable. 'If in truth the matter turned upon Her Majesty's resistance to this narrower request, it is quite possible 'that it was an error on the one side to press the request 'to extremity, and on the other to refuse it. Had it 'been upon the wider stipulation, all would surely have 'admitted that there was full warrant for the refusal.' The practice as now settled is, as Mr. Gladstone describes it, for the Mistress of the Robes, who is not periodically resident at the Court, but only an atten-

[1] *Gleanings of Past Years*, vol. i. p. 40.

dant on great occasions, to change with the Ministry; while the Ladies in Waiting, who, by virtue of their office, enjoy much more of personal contact with the Sovereign, are appointed and continue in their appointments without regard to the political connexions of their husbands.[1]

5. The history of the late Prince Consort throws a good deal of light on certain constitutional questions which, in parallel circumstances, may again be mooted, and for the solution of which certain controversies which that history records will certainly be cited as precedents. The personal character and conduct of the Prince, and the details of the political conflicts by which the constitutional issues from time to time at stake were too often shrouded, are now sufficiently known to all by the help of Mr. Theodore Martin's elaborate biography. It is fortunately, however, quite possible to separate the accidental, personal, and political details from the matters which were and are of lasting constitutional interest.

Writing to the Queen on the 10th of December preceding his marriage in the February of 1840, the Prince discloses a clear apprehension of the purely non-party character which, constitutionally speaking, it behoved a Royal Consort to assume. With respect to the selection of members of his household, he writes: 'I should wish 'particularly that the selection should be made without 'regard to politics, for if I am really to keep myself 'free from all parties, my people must not belong exclusively to one side. . . . It is very necessary they 'should be chosen from both sides—the same number 'of Whigs as of Tories.'[2]

[1] See Guizot's *Life of Sir Robert Peel*, p. 81.

[2] Martin's *Life of the Prince Consort*, vol i. p. 54.

On the 27th of January following, both Houses of Parliament had questions before them relating to the topic of the approaching marriage. In the House of Commons, Lord Melbourne's Government had proposed that an annuity of 50,000*l.* should be granted to the Prince, according to the analogy supplied by the case of the marriage of Prince Leopold with the Princess Charlotte, and the perhaps less closely analogous cases of the marriage of Queen Caroline to George the Second, Queen Charlotte to George the Third, and Queen Adelaide to William the Fourth. It seems to have been anticipated that the proposal would pass unchallenged, and all debate be avoided. It happened, however, that Mr. Hume proposed to reduce the annuity to 21,000*l.*, to which an amendment was carried by 262 to 158, on the motion of Colonel Sibthorpe, supported by Sir Robert Peel and several leaders of the Opposition, to reduce the annuity to 30,000*l.*, at which sum it was consequently fixed. The matter is mainly of interest as marking the firm and deliberate control assumed by Parliament in a matter on which the feelings of the Sovereign might be supposed to be deeply engaged; and this relevancy of the event is not diminished by the undoubted fact that the division and controversy are mainly attributable to the accidental opposition of parties in the House at the time.

On the same evening, in the House of Lords, was brought forward the Bill for the naturalisation of the Prince, and it contained a clause giving to the Prince precedence for life next after Her Majesty, in Parliament or elsewhere, as Her Majesty might think proper. The Duke of Wellington took occasion of the omission of reference to this clause in the title of the Act, to move the adjournment of the discussion on the Bill, because

of the very large powers which it proposed to confer on the Queen, of which the House had no previous notice. Lord Brougham opposed the clause in question on the ground that the power to fix the Prince's rank, according to constitutional precedent, rested not with the Crown, but with Parliament; and he further contended that if the measure passed the anomaly might arise that the Prince, supposing him to survive the Queen without issue, might take precedence of the Prince of Wales. The general result of the discussions and opposition was that when the Bill went into committee on the 3rd of February, its object was confined to that expressed in the title, the naturalisation of the Prince, the question of precedence being left to be dealt with by the exercise of the Royal prerogative. On the 5th of March following, letters patent were issued, which declared that the Prince should thenceforth 'upon all occasions, and in 'all meetings, except when otherwise provided by Act 'of Parliament, have, hold, and enjoy place, pre-emi-'nence and precedence, next to Her Majesty.' It was not till the 2nd of July, 1857, that the title and dignity of Prince Consort were granted to him by Royal letters patent.[1] Mr. Martin relates that at the prorogation of Parliament on the 11th of August, 1840, the Duke of Sussex and others were disposed to question the right of the Prince to occupy the place beside the Queen both in the House of Lords and on the way there. The Prince occupied, however, in the House then, as on all future occasions, the seat next the throne; and the Duke of Wellington, speaking to the Queen a few days afterwards, said 'I told you it was quite right. Let the

[1] *Life of the Prince Consort*, vol. i. pp. 58–63.

'Queen put the Prince where she likes, and settle it 'herself,—that is the best way.'[1]

The question of the title of the Prince again came under discussion in the year 1845, when a paragraph suddenly appeared in one of the daily papers to the effect that the title of King Consort was about to be conferred upon the Prince, and it was added: 'This 'will, we presume, be preliminary to a demand for an 'increased grant.' On being questioned in the House of Commons by Mr. Peter Borthwick, on the 17th of February, as to the truth of the rumour, Sir Robert Peel said that the paragraph was wholly without foundation. It appears, however, from Mr. Theodore Martin's Life, and in a passage which cannot have been written without the distinct acquiescence of Her Majesty, that, as far back as 1841, Her Majesty had wished that the title of King Consort should be conferred upon the Prince. Mr. Martin cites the language of the Queen's published Journal for the 28th of December, 1841: 'He ought to 'be and is above me in everything really, and therefore 'I wish that he should be equal in rank to me;' and goes on as follows: 'Unknown to the Prince, she had 'fully canvassed the subject with Baron Stockmar. She 'found him, however, strongly opposed to the sugges-'tion; and, by Her Majesty's desire, he took means to 'ascertain the opinions of Sir Robert Peel and Lord 'Aberdeen. They both concurred in the conclusion he 'had himself arrived at. In common with himself, they 'felt how desirable it was to have a clear recognition of 'the status of the Prince. But although there was 'nothing in the Constitution expressly against such a

[1] *Life of the Prince Consort*, vol. i. p. 93.

'title, a King Consort without joint sovereignty would 'be a novelty, and no provision for such a condition of 'things existed in the Constitution. It was therefore 'decided to abandon the project, and to leave to time 'and circumstance to suggest some solution of the 'difficulty, when the Prince should be better known by 'the nation, and the general current of opinion should 'justify some decided action.'[1]

In a letter to Baron Stockmar, dated the 9th of March, 1845, the Prince alludes to the newspaper rumour and the question put in the House of Commons by Mr. Borthwick. He says, in the course of the letter, that the subject had not been discussed at Court, but that Sir Robert Peel had been startled, and was afraid that the authority cited by the newspaper had emanated from the Court. The Prince says further that he had seized the opportunity to discuss the question with Sir Robert Peel thoroughly, and 'the upshot 'was, that it is power and not titles which are esteemed 'here, that the public are inclined to attach ridicule to 'everything of the sort, that there is a lack of good 'precedents, that there are great constitutional diffi-'culties,' and the like.

Looking back upon the whole of this discussion from a time at which the rivalries of political parties have changed their objects and directions, and at which personal jealousies and misunderstandings, as directed against the Prince Consort, are almost forgotten, it is to be regretted that Parliament did not in the Naturalisation Bill assume the right of definitely assigning the rank and precedence of the Prince, instead of affording

[1] *Life of the Prince Consort*, vol. i. p. 257.

a precedent in favour of an extension of the Royal prerogative. The ambiguous position of the Prince could not in any way reduce his political influence, while, by tending to drive him into greater obscurity behind the Throne, it might have diminished his sense of public responsibility. The position of the Prince in the eyes of foreigners was also a legitimate matter of Parliamentary concern; and when it is remembered how many international differences and even wars have arisen from uncertainties in the matter of etiquette, no pains ought to have been spared in abating narrow political prejudices and enmities, for the sake of conferring on the Prince an intelligible and substantial dignity as nearly equivalent to that of the Queen as was possible in the nature of things. The following note,[1] which Mr. Martin appends as 'a memorandum by the 'Queen, May, 1856,' is a sufficient comment on the personal and international inconvenience resulting from the want of courage and energy displayed by Parliament, and the successive Governments of the day, in respect of ascertaining the true position of the Prince Consort. 'When I first married, we had much difficulty on the 'subject, much bad feeling was shown, several members 'of the Royal Family showed bad grace in giving pre-'cedence to the Prince, and the late King of Hanover 'positively resisted doing so. . . . When the Queen 'was abroad, the Prince's position was always a subject 'of negotiation and vexation; the position accorded to 'him the Queen always had to acknowledge as a grace 'and favour bestowed on her by the Sovereigns she 'visited. While, in 1856, the Emperor of the French

[1] *Life of the Prince Consort*, vol. i. pp. 61, 62 note.

'treated the Prince as a Royal personage, his uncle 'declined to come to Paris, because he would not give 'precedence to the Prince; and on the Rhine, in 1845, 'the King of Prussia would not give the place to the 'Queen's husband, which common civility required, 'because of the presence of an Archduke, the third son 'of an uncle of the reigning Emperor of Austria, who 'would not give the *pas*, and whom the King would 'not offend. The only legal position in Europe, ac- 'cording to international law, which the husband of 'the Queen of England enjoyed, was that of a younger 'brother of the Duke of Saxe-Coburg, and this merely 'because the English law did not know of him. This 'is derogatory to the dignity of the Crown of England.'

The constitutional position of the Prince Consort had some light thrown upon it by the offer which was made to him at different times of the office of Commander-in-Chief, and by the attitude which, after giving the matter careful deliberation, he finally adopted towards the proposition. Such an offer,—proceeding, as it did, from the Duke of Wellington, a man at once in possession of an almost unprecedented amount of personal popularity, and with special experience in administrative government,—naturally compelled the Prince to review in a spirit of the most anxious self-criticism the true and ideal position occupied by the Prince Consort towards the occupant of the Throne. The fact that the Queen is the recognised head of the army, and yet that, through the medium of financial control, of the passing of the annual Mutiny Act, and of the general supervision of the Executive Government, the army is directly subjected to Parliament, cannot but render the position of the Commander-in-Chief one in

which too great proximity to the person and counsels of the Sovereign must be productive, at the least, of constitutional embarrassment, and, in critical times, of real political difficulty. The grave thought given by the Prince to the whole of the question obliged him to recognise that his true position must be one which implied any amount of confidence, help, representation, and counsel, but which in no case could place the Prince Consort in a situation which might under any conceivable circumstances become one of constitutional antithesis either to the Queen or to Parliament. It is the more satisfactory to learn, from the Prince's correspondence with respect to this matter, that he appreciated to the full the undoubted constitutional position which is the only tolerable one for the husband or wife of a reigning monarch to occupy in this country, as it can scarcely be denied that,—whether on account of his being overborne by political zeal, or through a restlessness of temperament, or through the unwise counsels of those near him who had been brought up in a Continental school of thought,—he did at certain times personally intervene in the political contests of the day between the Queen's ministers and Parliament, and between the Queen's ministers and the Opposition party in the House of Commons, in a way and to a degree which the Constitution does not permit to the Queen herself, and which could only be attributed to the private action of the Prince Consort himself independently of the Queen.

The subject of the Commandership-in-Chief seems originally to have been mooted in 1842, when, says Mr. Martin, 'the appointment of the Prince to the office of 'Commander-in-Chief, in the event of the demise of

'the Duke of Wellington, had been privately contem-
'plated by the Ministry, and was even discussed at the
'same interview between Lord Aberdeen and Baron
'Stockmar.'[1] Mr. Martin says that Baron Stockmar at once expressed his decided disapproval of the project, and on nearly the same grounds which led the Prince to decline the office when its acceptance was pressed upon him by the Duke himself in 1850. In March, 1845, the Prince Consort relates, in a letter to Baron Stockmar, that he had discussed with Sir Robert Peel, then Prime Minister, the question of the Commandership-in-Chief, and that Sir Robert Peel had said, in regard to the Commandership-in-Chief, 'that the army would be
'greatly pleased by it,—that politically it would be the
'best arrangement, but that I should have to do the
'whole work myself, and must not delegate it to any-
'body else, if I am to be a real gainer by the appoint-
'ment,—that this would absorb all my time and atten-
'tion, and it is a question whether it is right to sacrifice
'for such an offer the duties which I owe to Victoria
'and to the education of our children.'[2]

It is curious to gather from this account that Sir Robert Peel seems scarcely to have apprehended the true constitutional difficulties in the way of the Prince assuming the office under consideration. These difficulties were far more exactly appreciated by the Prince himself in a letter which he wrote to the Duke of Wellington on the 6th of April, 1850, when a similar proposal had been made. The letter itself has a further interest as showing in adequate language the true constitutional position of a Prince Consort.

[1] *Life of the Prince Consort*, vol. i. p. 150. [2] *Id.* vol. i. p. 259.

'My dear Duke,—The Queen and myself have 'thoroughly considered your proposal to join the offices 'of Adjutant-General and Quartermaster-General into 'one of a Chief of the Staff, with a view to facilitate 'the future assumption of the command of the army by 'myself. The question whether it will be advisable 'that I should take the command of the army or not 'has been most anxiously weighed by me, and I have 'come to the conclusion that my decision ought en- 'tirely and solely to be guided by the consideration 'whether it would interfere with or assist my position 'of Consort of the Sovereign, and the performance of 'the duties which this position imposes upon me. This 'position is a most peculiar and delicate one. Whilst 'a female sovereign has a great many disadvantages in 'comparison with a king, yet, if she is married, and her 'husband understands and does his duty, her position, 'on the other hand, has many compensating advantages, 'and, in the long run, will be found even to be stronger 'than that of a male sovereign. But this requires that 'the husband should entirely sink his *own individual* 'existence in that of his wife—that he should aim at 'no power by himself or for himself—should shun all 'contention, assume no separate responsibility before the 'public, but make his position entirely a part of hers— 'fill up every gap which, as a woman, she would naturally 'leave in the exercise of her regal functions—continu- 'ally and anxiously watch every part of the public 'business, in order to be able to advise and assist her 'at any moment in any of the multifarious and difficult 'questions or duties brought before her, sometimes 'international, sometimes political, or social, or personal. 'As the natural head of her family, superintendent of

'her household, manager of her private affairs, sole '*confidential* adviser in politics, and only assistant in 'her communications with the officers of the Govern-'ment, he is, besides, the husband of the Queen, the 'tutor of the royal children, the private secretary of 'the Sovereign, and her permanent minister.'[1]

The Prince goes on to ask how far it would be consistent with his position to undertake the management and administration of a most important branch of the public service, and the individual responsibility attaching to it—becoming an executive officer of the Crown, receiving the Queen's commands through her Secretaries of State, and the like. Further on, he intimates that, while the theory of the British Constitution is that the Sovereign commands the army, and this has hitherto been the practice also, it is a source of great weakness to the Crown that the Sovereign, being a lady, cannot exercise that command as she ought, and give the Commander-in-Chief that support which he requires under ordinary circumstances; and that consequently it became his additional and special duty to supply the wants in this respect, and to bestow particular care and attention on the affairs of the army.

It is a striking illustration of the justness of the apprehensions entertained by the Prince in this letter, that five years afterwards (in December, 1855) the Prince, as occupying a position very subordinate to that of Commander-in-Chief, and in fact almost purely honorary,—that of Colonel of the Grenadier Guards,—became the victim of a public misunderstanding which was calculated to perplex his constitutional relations to

[1] *Life of the Prince Consort*, vol. ii. pp. 259, 260.

the Crown on the one hand and the country on the other. The officers of the Grenadier Guards had memorialised Her Majesty for the purpose of getting redress for an alleged act of injustice by which, owing to the operation of a Royal Warrant of the 6th of October, 1854, Lieutenant-Colonels, after three years' service in actual command of a battalion, became by right full Colonels if officers of the Line, but not if they were officers of the Guards. The Prince, as Colonel of the Grenadier Guards, had appended his name to the memorial, and thereupon a general attack was made upon him in the *Times* newspaper, making mention of 'a general 'assertion that the Prince exercised much influence in 'military matters, especially as respects the highest mili-'tary appointments,' and saying that it was intolerable that the Queen should be 'placed in the ungracious 'position of refusing the prayer of one who ought to be 'careful how he sues, where he should not sue in vain,' inasmuch as his name to the petition 'gave a force to 'the prayer which almost converted it into a com-'mand.'[1]

In contrast to the clear theoretical view of his position to which the Prince Consort from time to time gave expression, in reference to the Commandership-in-Chief, it is necessary to notice with some particularity a few illustrative instances in which he practically vindicated for himself a position which either implied an unprecedented extension of the functions of Royalty in the matter of interference with the practical conduct of the Government, or the interposition between the Crown and its Ministers of a wholly novel personality,

[1] *Life of the Prince Consort*, vol. iii. p. 412.

independent of the Crown, and not subject, as are the Ministers of the Crown, to the control of Parliament. So far as these acts of interference implied an extension of the functions of Royalty, the subject belongs properly to the consideration of the general topic of the Royal prerogative and of the recent controversies relating to it, which will be discussed in the next section. So far as these acts point to a novel claim generally to interpose in administrative action, put forward, whether in theory or practice, by the Prince Consort, as occupying a position distinct from that of the mere agent or confidential representative of the Crown, it needs only to recall some of the circumstances of these acts of intervention to demonstrate how far they are incompatible with the structure and working of the English Constitution in its historic and legal form.

The political inconvenience resulting from any appearance of concern on the part of a Prince Consort in the result of a party conflict in the Houses of Parliament, as well as the harassing position in which he may be placed by any exhibition of such sympathy, may be understood from what took place when the Prince Consort appeared in the House of Commons on the 27th of January, 1846, while Sir Robert Peel was developing, in a series of resolutions, his scheme of financial policy, which included a total abolition of the Corn Laws at the end of three years. The time was one of no ordinary political excitement, inasmuch as the indignation of the Tories against Sir Robert Peel for what was regarded by them as his treachery had just reached fever-point. Mr. Disraeli, in his life of Lord George Bentinck, recalled with manifest approval the strong language of Lord George Bentinck in deprecation of the Prince's

conduct; and the passage cited from the speech is of the greater importance because neither Lord Beaconsfield nor Lord George Bentinck could at any time in his career be accused of disloyalty or of want of the most faithful attachment to the English monarchy and to monarchical institutions generally. 'If,' said Lord George Bentinck, speaking on the twelfth night of the debate, 'so humble an individual as myself might be 'permitted to whisper a word in the ear of that illus-'trious and royal personage, who, as he stands nearest, 'so is he justly dearest to her who sits upon the throne, 'I would take leave to say that I cannot but think he 'listened to ill-advice when, on the first night of this 'great discussion, he allowed himself to be seduced by 'the first minister of the Crown to come down to this 'House to usher in, to give *éclat*, and, as it were, by 'reflection from the Queen, to give the semblance of a 'personal sanction of Her Majesty to a measure, which, 'be it for good or for evil, a great majority, at least, of 'the landed aristocracy of England, of Scotland, and of 'Ireland, imagine fraught with deep injury, if not ruin, 'to them—a measure, which, not confined in its opera-'tion to this great class, is calculated to grind down 'countless smaller interests engaged in the domestic 'trades and interests of the Empire, transferring the 'profits of all these interests—English, Scotch, Irish, 'and Colonial—great and small alike, from Englishmen, 'from Scotchmen, and from Irishmen, to Americans, 'to Frenchmen, to Russians, to Poles, to Prussians, and 'to Germans.'

Mr. Disraeli records that the fact that 'many mode-'rate men on both sides' were disquieted by the incident of the Prince's presence in the House was enough to

satisfy the Prince that he had been better away.[1] It is proper to notice that to his account of the transaction Mr. Martin adds 'a note by the Queen,' which is as follows: 'The Prince merely went, as the Prince of 'Wales and the Queen's other sons do, for once to hear 'a fine debate, which is so useful to all princes. But 'this he naturally felt unable to do again.'

It is well known with what strained and unintermittent attention both the Queen and the Prince Consort watched the events of the Crimean war. It was no doubt unavoidable, even were it matter for regret, that both the one and the other studied, in the way described in Mr. Martin's third volume, every political and military circumstance which from month to month determined the progress of the war, and that they not only were always ready to give the help of their counsel to the Government of the day in cases of real perplexity, but were on occasions eager to take the initiative in suggesting a policy and plan of military action for which the Government was not yet prepared. Nevertheless, while making all allowances for the promptings of an eager and patriotic spirit, it is impossible not to descry in some acts of the Prince Consort during this period a disposition to overstep the limits which a due regard to the working of the Constitution must affix both to the exercise of the Royal prerogative and to the freedom of independent action conceded to a Prince Consort. In such matters as proffered advice, suggestions, exhortations, warnings, and the like, the line is undoubtedly a fine one which could be drawn for the purpose of separating a commendable human solicitude in a matter at

[1] *Life of Lord George Bentinck*, by B. Disraeli, p. 106.

once of the deepest importance and of a peculiarly close personal concern from the cautious, self-restrained, and purely tentative suggestiveness which could alone befit either a Sovereign, who is known to the Constitution only through the Ministers of the Crown, or an extrinsic counsellor who has no other constitutional relations to those Ministers than such as are necessarily implied in personal intimacies and friendly associations. However difficult it may be to draw this line, no unprejudiced reader of the Prince's biography could deny that at certain crises during the Crimean war he assumed a position of consciously directed influence, and indeed exerted a pressure over the counsels of the Cabinet and, indirectly, over the actions of Parliament, which, if it had proceeded from a King such as George III., would in the present day have met with the sternest constitutional remonstrance; and which, if defended on the ground of its being solely appropriate to the situation of a Prince Consort, must render the discharge of such political functions incompatible with the existence of harmonious relations between the Cabinet and Parliament, and with the free and unrestrained internal action of the Cabinet in view of these relations. It is not necessary to supply more than two or three instances of what is meant by these assertions.

At the close of the year 1854, when the worst accounts had arrived from the Crimea, and Lord Raglan had reported that, even although Sebastopol should be taken, it was doubtful whether he could keep his forces in the Crimea during the winter, the Prince Consort wrote on the 11th of November a letter to Lord Aberdeen, in which, after reviewing what he regarded as the causes of the disasters, he says: 'The time is

'arrived for vigorous measures, and the feeling of the 'country is up to support them, if Government will 'bring them boldly forward. The measures immediately 'wanted, according to my views, are' . . . and then he enumerates six measures, of which the fourth is 'the 'obtaining the power for the Crown of enlisting 'foreigners,' and the fifth, 'immediate steps for the 'formation of foreign legions, to be attached eventually 'to Lord Raglan.' The Prince adds: 'These measures 'might be taken on the responsibility of the Govern-'ment, awaiting an Act of Indemnity, or might be 'laid before Parliament, convened for the purpose. 'Pray consider this with your colleagues.' Mr. Martin goes on to record that this letter was read by Lord Aberdeen to the Cabinet the same day; but 'they 'were opposed, as we learn from the Prince's Diary, to 'the proposal to raise a Foreign Legion, and to the com-'pletion of the Militia by ballot.' However, 'within a 'few weeks every one of the Prince's suggestions had 'to be adopted, and in the short session of Parliament 'at the end of this year measures were passed, but not 'without vehement opposition, to authorise the raising 'of a Foreign Legion, and to enable the Government 'to send the Militia to the stations in the Mediterra-'nean, and so to make the regiments there available for 'service in the Crimea.'[1]

It appears from this account that some of the Prince's measures met with opposition from the general body of the Cabinet, and were also vehemently resisted in Parliament. Whether these measures were good or bad, there is at least suggested the possibility that they

[1] *Life of the Prince Consort*, vol. iii. p. 146.

were acquiesced in by the Cabinet against their own judgment and in deference to the judgment or influence of the Prince Consort, and that, in commending them to Parliament, the Cabinet, while seeming to urge the results of their own unbiassed deliberations, were in fact complying with a recommendation from a quarter of overwhelming moral weight, and yet to which they could not make even the most covert allusion. The policy of raising a Foreign Legion, however tempting from the pressing circumstances of the day, stands out in a clearer light when regarded in view of the rupture with the United States which it nearly produced during the year 1856, when Mr. Crampton, the British Minister at Washington, received his passports from the President and left the country, because of charges which had been made against the British Government of violating the neutrality of the United States by enlisting recruits for the British service. A resolution was introduced into the House of Commons alleging that 'the conduct of Her Majesty's Government in the 'differences with the United States on the question of 'enlistment has not entitled them to the approbation 'of the House.' Lord Palmerston succeeded in evading the resolution by the use of his habitual adroitness in returning the charge of exciting differences between the two countries on the supporters of the Resolution. He tried to show that the effect of such a discussion would be 'to excite a spirit of resentment towards our 'neighbours and kindred in the United States,' and that this was not 'the way to persuade the American people 'to cultivate the most friendly relations with England.'[1]

[1] *Life of Henry John Temple, Viscount Palmerston*, 1846–1865, by the Hon. Evelyn Ashley, M.P., vol. ii. p. 122.

An instance of still more marked and questionable intervention on the part of the Prince Consort in the affairs of Government is supplied by the strong partisanship he exhibited in respect to the policy of carrying on the war, when propositions for peace were under discussion in the House of Commons in May, 1855. Mr. Disraeli, on the 24th of May, moved a resolution by which the House was called upon to express 'its 'dissatisfaction with the ambiguous language and un-'certain conduct of Her Majesty's Government in 'reference to the great question of peace or war,' and to declare that it would 'continue to give every support 'to Her Majesty in the prosecution of the war until 'Her Majesty should, in conjunction with her allies, 'obtain for the country a safe and honourable peace.' In the course of the debate Mr. Gladstone explained the views of those former members of Lord Aberdeen's Cabinet who, with himself, had lately seceded from Lord Palmerston's Government. He urged the making of peace on the terms offered by Russia, and argued that the limitation of the Russian fleet now demanded was an indignity to Russia. He said that all the terms originally insisted upon had been substantially conceded, and that it would be immoral, inhuman, and unchristian to protract the war not for terms but for military success. On the 3rd of June, 1855, while some of the stages of the whole debate were not yet completed, the Prince Consort wrote a letter to Lord Aberdeen with the obvious purpose of inducing him to use his personal influence over the members of his late Cabinet to persuade them to desist from placing obstacles in the way of actively prosecuting the war. The Prince writes as follows: 'I had sent Colonel Phipps to your house to

'know whether you were in town, and whether it would 'be convenient to you to come here [to Buckingham 'Palace] for a few minutes before dinner. He has not 'found you at home, and I am therefore compelled to 'write to you upon a subject which would have been 'much better treated in conversation than it can be in 'a hurried letter—I mean the line which your former 'friends and colleagues, with the exception of the Duke 'of Newcastle, have taken about the war question. It 'has caused the Queen and myself great anxiety, both 'on account of the position of public affairs, and on 'their own account. As to the first, any such declara- 'tion as Mr. Gladstone has made on Mr. Disraeli's 'motion must not only weaken us abroad in public esti- 'mation, and give a wrong opinion as to the determi- 'nation of the nation to support the Queen in the war 'in which she has been involved, but render all chance 'of obtaining an honourable peace without great fresh 'sacrifices of blood and treasure impossible, by giving 'new hopes and spirit to the enemy. As to the second, 'a proceeding which must appear to many as unpatri- 'otic in any Englishman, but difficult to explain even 'by the most consummate oratory on the part of states- 'men who have, up to a very recent period, shared the 'responsibility of all the measures of the war, and that 'have led to the war, must seriously damage them in 'public estimation. The more so, as, having been pub- 'licly suspected and falsely accused by their opponents 'of having, by their secret hostility to the war, led to 'all the omissions, mistakes, and disasters, which have 'attended the last campaign, they now seem to exert 'themselves to prove the truth of these accusations, 'and (as Americans would say) to "realise the whole

'"capital" of the unpopularity attaching to the authors
'of our misfortunes, whom the public has for so long
'a time been vainly endeavouring to discover. How-
'ever much on private and personal grounds I grieve
'for this, I must do so still more on the Queen's behalf,
'who cannot afford in these times of trial and difficulty
'to see the best men in the country damaging them-
'selves in its opinion to an extent that seriously impairs
'their usefulness for the service of the State.' The letter concludes with the words: 'I write all this now,
'because the adjourned debate is to be re-opened to-
'morrow, and I could not reconcile it to myself not to
'put you in possession of all I feel upon this subject,
'which I know you will receive in the same spirit in
'which it is given.'

After citing this letter, Mr. Martin says that it 'seems to have had little effect in modifying the views
'of Mr. Sidney Herbert or Sir James Graham, who
'both spoke in the debate and strongly advocated a
'cessation of the war on the terms offered by Russia.' In a letter written on the 7th of June by the Prince Consort to Baron Stockmar, he says: 'Our debate is still
'proceeding, and, as you will have seen, Cobden and
'Graham have made Russian speeches. I wrote a
'fiery (geharnischten) letter to Aberdeen, to which he
'would not reply in writing, but preferred paying me a
'visit yesterday. In a two-hours' discussion I think
'I satisfied him, that Palmerston has acted precisely
'as Aberdeen would have acted, although the suspicion
'that Palmerston did not wish for peace may quite
'possibly be well founded.' Mr. Martin, in commenting on the debate, says that 'the eloquence of Mr.
'Cobden, Mr. Bright, Sir James Graham, and Mr.

'Sidney Herbert fell flat upon ears that were little 'inclined to adopt the praises of Russia, with which 'their speeches abounded, and their views of the terms 'of peace which should satisfy the allies for their 'sacrifices in the war.'[1]

In introducing this correspondence, Mr. Martin says that 'the intimate friendship which had so long 'existed between the Prince and Lord Aberdeen justi- 'fied him in making the late Premier aware of the 'impressions produced upon Her Majesty and himself 'by the line of policy adopted by his late colleagues.' But it is to be remembered that Lord Aberdeen was, or was treated for this purpose as, the leader of an influential party in Parliament opposed to the Government of the day; and that, notwithstanding the undoubted propriety of the utmost possible liberty being left to the natural play of the relationships of private friendship and ordinary intercourse, it was impossible for the Prince Consort to take such anxious pains to enforce his views on the leader of a party with respect to the critical party question of the hour without bringing an influence to bear far other than what was merely personal and private, and for which no theoretical view of the British Constitution has ever yet found a place.[2]

[1] *Life of the Prince Consort*, vol. iii. p. 289.

[2] The most recent account of the transactions here alluded to is given by Mr. Gladstone, a prime actor in them; and though the narrative is not strictly relevant to the constitutional point now under consideration, yet it is fair to complete what is said in the text by making the following extract from Mr. Gladstone's review of the *Life of the Prince Consort*. 'The Aberdeen Government had 'resisted, unanimously and strongly, the appointment of what was 'termed the Sebastopol Committee. The Palmerston Government 'set out with the intention of continuing that resistance. Its Head,

Considering the personal relationships which are by courtesy held to exist, and do largely exist in fact between the Sovereigns of Europe and their families, it is no doubt a matter of considerable difficulty to restrict the communications which may pass between one member of the regal group and another, and to prevent the language of friendly correspondence occasionally passing into that of international diplomacy. Indeed, a claim has of late been set up in this country, by the advocates of an extension of the Royal prerogative, which, if conceded, would go far to establish the occupant of the Throne for the time being as his or her own Foreign Minister, without responsibility either to Par-

'and the majority of its members, arrived at the conclusion that 'the resistance would be ineffectual, and they determined to succumb. 'The Peelites adhered to their text; and, as the minority, they in 'form resigned, but in fact, and of necessity, they were driven from 'their offices. Into the rights of the question we shall not enter; 'but, undoubtedly, they were condemned by the general opinion out 'of doors. Moreover, as in the letting out of water, the breach, once 'made, was soon and considerably widened. They had been parties 'in the Cabinet, not only to the war, but to the extension, after the 'outbreak had taken place, of the conditions required from Russia. 'But when it appeared that those demands were to be still further 'extended, or were to be interpreted with an unexpected rigour, and 'that the practical object of the Ministerial policy appeared to be a 'great military success in prosecuting the siege of Sebastopol to a 'triumphant issue, they declined to accompany the Ministry in their 'course. Again they met with the condemnation of the country; 'and the Prince Consort, while indicating his high opinion of the 'men, has recorded his adverse judgment. One admission may 'perhaps be made in their favour. In the innumerable combina-'tions of the political chess-board, there is none more difficult for 'an upright man than to discern the exact path of duty, when he 'has shared in bringing his country into war, and when, in the midst of that war, he finds, or believes himself to find, that it is being waged for purposes in excess of those which he had approved.' *Gleanings of Past Years*, vol. i. p. 124.

liament or the country. The discussion as to the nature and value of such a claim belongs to the general subject of the Royal prerogative, which will be entered upon in the next section. In the meantime it is obvious in this case, as in the other cases of political intervention already noticed, that a Prince Consort cannot with propriety extend the character of his communications with foreign Powers beyond the limit permitted to the Sovereign, and that, if he attempts to do so, he thereby creates a personality wholly unknown to the Constitution. The Prince Consort, indeed, in all his communications of a political bearing with foreign Powers, is distinctly credited by his biographer with having taken anxious care to submit his letters to the Prime Minister and Foreign Secretary of the day. But by doing so, and securing their formal approval, he was none the less constituting himself an agent of Her Majesty's Government, to whose acts and initiatory suggestions the criticism of Parliament could in no case extend. When the result of these informal despatches or negotiations was satisfactory, the biographer of the Prince naturally reports them with fulness, and evidently takes pleasure in imputing the success achieved to the Prince's intervention. But should any hitch have occurred in the correspondence, or sensibilities have been wounded, or misunderstandings created, it is easy to see that the Ministry of the day would have had before them a most arduous task in obliterating the effects of these extra-official communications, and in putting Parliament into possession of all the facts out of which possibly a strained condition of international relations may have arisen. There is no doubt that the Prince Consort himself was a keen student of politics, and was an emi-

nently sagacious, an astute, and,—excepting always his unconscious invasions of the Constitution,—a cautious man. But if the precedent set by him were generally admitted as the rule of conduct for every one hereafter in his position, the fortunes of the country might be made to turn not on the tried stability of firmly settled institutions and practices, but on the accidental character and qualifications of one individual person. It is needless to point out that one chief portion of the whole struggle of English constitutional history has been to rest the fabric of the State upon fixed institutions as a substitute for the sandy foundation of personal character.

A leading instance of the sort of informal political agency which the Prince Consort consented to undertake in his communications with foreign Powers, is supplied by the correspondence conducted by the Prince with the Emperor of the French in 1857, on the receipt of a letter of congratulation from the Emperor on the birth of the Princess Beatrice. The Emperor's letter touched upon the vexed question of Neuchâtel, and alluded to the approaching visit to Paris of the Grand Duke Constantine. 'I am grieved,' the Emperor wrote, 'to see that the English attach a significance to this 'visit which does not belong to it. We are gratified here by the goodwill and courtesy shown to us by 'Russia, but this in no way weakens the interest and 'the feelings by which we are bound to England.' Mr. Martin records that, as the letter touched upon politics, 'it was as a matter of course passed on by the Prince 'to the Foreign Secretary. It seemed to Lord Clarendon, and also to Lord Palmerston, to furnish an opportunity for opening the Emperor's eyes to the fact,

'of which they were well aware through authentic 'intelligence from other quarters, that the *bons pro-* '*cédés* of Russia meant something more than the 'courtesy of courtly friendship, and were part of a 'well-studied scheme for undermining the Anglo-French 'alliance. They also thought it well he should be told 'that it was not wholly without reason that the English 'Press were suspicious of the obsequious advances of 'the Russian Court to a Sovereign whom that Court 'had treated at the outset of his reign with studied 'indignity, and with whom, or the political creed of 'whose people, they could not have any natural sym- 'pathy. Accordingly, acting upon their suggestion, 'the Prince drew up the following reply. It was well 'known that the Emperor attached the greatest value 'to his good opinion. Neither was any one more likely 'to influence a mind which was already beginning to 'cast about for the means of carrying into effect his 'favourite projects for the readjustment of the boun- 'daries of Europe, and which, in the matter of the 'Danubian Principalities, about which a keen diplo- 'matic controversy was now raging, had shown a dis- 'position to fall in with the views of Russia rather than 'with those of Austria and England.' Mr. Martin then reproduces a great part of the Prince's reply, thus written to a great extent at the dictation of the Government, but yet exempt from all Parliamentary or other responsibility. The Prince says,—in a somewhat patronising way, it must be allowed:—'Your Majesty 'does well to cultivate the friendship of all the reign- 'ing families of Europe, and of the peoples over whom 'they rule. The greatest good may result from rela- 'tions of this kind; and our alliance would be a veri-

'table bondage if from jealous motives it asked you to 'renounce for its sake every other friendship. It is a 'sincere pleasure to the Queen and to myself that your 'Majesty should be more known and understood. But 'the impression which this interchange of courtesies 'with Russia may produce, both upon Russia herself 'and upon the rest of the European public, is quite 'another matter, and is well worthy of consideration.' The Prince then goes on minutely to argue in favour of these propositions, with all the care and precision of a diplomatic despatch. He shows what is likely to be the effect of the Emperor's interview with the Grand Duke upon European opinion, French opinion, and English opinion; and, in view of a conceivable Russian alliance, he points out that such an alliance could have nothing for its basis but an external and purely political motive. 'Immediately all Europe sets to work to 'reflect, and asks itself what this motive is, confidence 'is shaken; England naturally is the first to take the 'alarm, which is soon shared equally by the rest of the 'world. The Queen and myself personally are con- 'vinced that your Majesty has no intention of this kind, 'and so far as we are concerned, the fresh assurances 'on this subject which your Majesty has been pleased 'to give in your last letter were superfluous. At the 'same time I have thought it well to explain the cause 'of the susceptibility of the public and the press, which 'in my judgment has its origin in the very idea which 'is at the bottom of our alliance.'

Mr. Martin appends to this letter the following pertinent words: 'This letter, before being despatched, 'was submitted in the usual way to the consideration 'of the Prime Minister and Lord Clarendon. By them

'it was pronounced "most excellent." "It ought,"
'Lord Clarendon wrote to the Prince, "to open the
'"Emperor's eyes to the consequences of his adulation
'"of Russia, and, above all, to put him on his guard
'"against that extremely well-veneered gentleman the
'"Grand Duke Constantine."'[1]

[1] *Life of the Prince Consort*, vol. iv. p. 32.

SECTION II.—THE CROWN AND ITS MINISTERS.

THERE is no political term which is used more ambiguously than the term *Prerogative*. The misuse or abuse of the term, if it has not been replete with danger, has certainly been the cause of an indefinite amount of confusion and misunderstanding. The word Prerogative is, in its most general sense, used to express the freedom of independent action which belongs to the Crown; and no distinction is customarily drawn between the personal liberty of the Sovereign, which is only hemmed round and restricted by the action of the Crown's constitutional advisers, and the freedom of action of the Crown, which is only controlled by the competing rights of Parliament. To ascertain the prerogative of the Crown in the former sense would be to determine what were the relations of the Crown to its Ministers, the two being regarded from opposite points of view, and as placed in provisional antithesis the one to the other. So far as the Sovereign could act without consulting the Ministry, or could interfere with their free action, or could exercise an unconstrained volition in choosing or dismissing them, so great, and no greater, would be held to be the measure of the Royal prerogative. But the word Prerogative is also used in the sense of the extent of the right of free action of the Crown and its Ministers, looked upon as acting harmoniously together, which is only indirectly, if at all, subject to the control of Parliament. The Ministers of the Crown are indeed always looked upon as responsible for the due and proper exercise of the prerogative in this latter sense of the term; and it has been one

main object of constitutional struggle in this country to render the Ministers of the Crown more and more directly and certainly accountable for the mode, time, and degree in which the prerogative is exercised. In some cases, indeed, where the quality or amount of the prerogative is in any degree uncertain, or too much limited for the purpose in hand, an Act of Parliament is passed to clear up the doubts or to supplement the deficient prerogative by conferring on the Crown new and special powers. An instance of this is at hand in the Act which enables the Crown, by its Ministers, to publish Articles of War for the administration of the Army. The limits of the prerogative in this sense are on the whole less shifting, and defined with greater legal precision, than the limits of the prerogative in the other sense. Though the use of the word Prerogative for both purposes is in the highest degree inconvenient, the two senses of the term are really existent and must be separately examined in any exhaustive constitutional inquiry. In the present section the first sense of the term Prerogative will be alone considered, and the immediate subject of investigation will therefore be the relation of the Sovereign to those who may be properly called the Ministers of the Crown. In the next section the consideration of the other use of the term Prerogative will introduce a discussion as to the relation of the Ministers of the Crown to Parliament.

In order to determine the actual relation of the Sovereign to the Ministers of the Crown, as developed by the most recent history, it is necessary to point out that those Ministers, in their organised character as a Cabinet, are a mere accidental historical outgrowth of the older Privy Council; and that they occupy a posi-

tion somewhere intermediate between the Houses of Parliament and the Crown, of a kind to which no precedent in former times, and no institution in other countries, supplies any exact analogy. The problem for many centuries before the country was, how to provide an effective administrative Council close to the Sovereign, and yet to secure for Parliament the largest possible amount of control, both over the Council in its corporate capacity, and over every individual member of it. A variety of devices were resorted to in different ages to secure these ends, among which may be noted spasmodic and almost revolutionary appeals to the King to dismiss 'evil counsellors;' impositions on the King of specially-named counsellors for temporary purposes, or in order to remedy crying wrongs and abuses; the desultory use of the weapon of impeachment; the more formal effort resorted to in the Act of Settlement to secure responsibility by requiring that 'all matters 'and things relating to the well-governing of the king-'dom, which are properly cognisable in the Privy 'Council, by the laws and customs of the realm, should 'be transacted there, and all resolutions taken there-'upon should be signed by such of the Privy Council 'as should advise and consent to the same;' and the persistent remonstrances, in Parliament and in the press, during George III.'s reign, against the irregular counsels believed to be afforded to the Sovereign by those who were designated 'the King's friends.' But, side by side with the more recent of these expedients, there was growing up the institution of the Cabinet Council, which, with all its defects and occasional jars in the working, seems admirably qualified to attain the end of combining the utmost concentration

and unity of executive force with a very considerable degree of responsibility from day to day to both Houses of Parliament.

The earliest mention of the Cabinet Council is in Pepys' Diary. Writing on the 16th of November, 1667, Mr. Pepys says: 'Met Mr. Gregory, my old acquaint-'ance, an understanding gentleman; and he and I 'walked an hour together, talking of the bad prospect 'of the times; and the sum of what I learn from him 'is this: that the King is the most concerned in the 'world against the Chancellor, and all people that do 'not appear against him, and therefore is angry with 'the Bishops, having said that he had one Bishop on 'his side, Crofts, and but one: that Buckingham and 'Bristoll are now his only Cabinet Council; and that, 'before the Duke of York fell sick, Buckingham was 'admitted to the King of his Cabinet, and there stayed 'with him several hours, and the Duke of York shut 'out.'[1] According to Lord Clarendon, however, the expression 'Cabinet Council' originated as early as 1640, in the following way: 'The bulk and burden of 'the State affairs lay principally upon the shoulders of 'the Archbishop of Canterbury, the Earl of Strafford, 'and the Lord Cottington; some others being joined to 'them, as the Earl of Northumberland for ornament, 'the Bishop of London for his place, the two Secretaries, 'Sir H. Vane and Sir Francis Windebank, for ser-'vice and communication of intelligence; only the 'Marquis of Hamilton, indeed, by his skill and interest, 'bore as great a part as he had a mind to do, and had 'the skill to meddle no further than he had a mind.

[1] *Diary and Correspondence of Samuel Pepys, F.R.S.*, 5th ed. vol. iii. p. 304.

'These persons made up the Committee of State, which 'was reproachfully after called the *junto*, and enviously 'then in the Court *the Cabinet Council.*'[1]

In the fourth volume of his History of England, Lord Macaulay has traced with considerable precision the rise of a true responsible Ministry to the period in the reign of William III. which intervened between 1693 and 1696. He describes how in the earlier years of the reign of William there was no Ministry at all; and that at the close of 1693 the chief offices in the Government were distributed not unequally between the two great parties; that the men who held those offices were perpetually caballing against each other, haranguing against each other, moving votes of censure on each other, exhibiting articles of impeachment against each other; and that the temper of the House of Commons was wild, ungovernable, and uncertain. 'Everybody could perceive,' says Lord Macaulay, 'that at the close of 1696 all the principal 'servants of the Crown were Whigs, closely bound 'together by public and private ties, and prompt to 'defend one another against every attack, and that the 'majority of the House of Commons was arrayed in 'good order under those leaders, and had learnt to 'move like one man at the word of command.' In giving the history of the period of transition and of the steps by which the change was effected, Lord Macaulay attributes the 'chief share in forming the 'first English Ministry' to Sunderland, who had disappeared at the time of the flight of James, and did not reappear at Court till 1691, nor attend regularly

[1] *History of the Rebellion*, vol. i. p. 211, ed. 1849.

in the House of Lords till the following year. Early in 1693, it was rumoured that Sunderland was consulted on all important questions relating to the internal administration of the realm; and Lord Macaulay says that he formed the opinion that 'as long as the King 'tried to balance the two great parties against each 'other, and to divide his favours equally between them, 'both would think themselves ill-used, and neither 'would lend to the Government that hearty and steady 'support which was now greatly needed.' His Majesty must make up his mind to give a marked preference to one or the other; and there were weighty reasons for giving the preference to the Whigs. Lord Macaulay proceeds to describe the formation of the first Whig Ministry, observing that the organisation of the Whigs 'was not indeed so perfect as it afterwards became, but 'they had already begun to look for guidance to a small 'knot of distinguished men, which was long afterwards 'widely known by the name of the Junto. There is, 'perhaps, no parallel in history, ancient or modern, to 'the authority exercised by this Council, during twenty 'troubled years, over the Whig body. The men who 'acquired that authority in the days of William and 'Mary continued to possess it without interruption, in 'office and out of office, till George I. was on the 'throne.'[1]

The problem which now had to be solved was how to reconcile this effective Parliamentary Committee, the institution of which is thus seen to have been due to the special condition of parties in the time of William III. and to the personal character and peculiar

[1] *History of England from the Accession of James II.* By Thomas Babington Macaulay. Vol. iv. p. 435.

position of that King, with the older and permanent organisation of the Privy Council, which was far too deeply rooted in the monarchical system of this country to be superseded by the mere will or influence of any single statesman or group of statesmen. In his account of the framing of the Act of Settlement in the year 1700 (12th and 13th William III. cap. 2), and especially of the clause already alluded to, for requiring the signatures of the members of the Privy Council to the measures which they severally should recommend or assent to, Mr. Hallam points out that a distinction had arisen long before between the confidential advisers of the Sovereign, who had formed a sort of spontaneous organisation for the more close and private management of business, and the 'sworn and notorious councillors' whose deliberation and assent were needed in the case of all formal resolutions of the Crown as to foreign alliances, or the issuing of proclamations and orders at home, or any other overt act of government. Mr. Hallam cites an interesting passage in proof of this from Trenchard's 'Short History of Standing Armies,' published in 1698. 'Formerly all matters of state and 'discretion were debated and resolved in the Privy 'Council, where every man subscribed his opinion and 'was answerable for it. The late King Charles was the 'first who broke this most excellent part of our Consti-'tution, by settling a Cabal or Cabinet Council where 'all matters of consequence were debated and resolved, 'and then brought to the Privy Council to be con-'firmed.'[1] The following passage from the Report in the Parliamentary history of a debate in Queen Anne's

[1] *Hallam's Constitutional History*, vol. iii. p. 183, note. 7th ed.

reign, in the House of Lords (January, 1711), points emphatically to the current confusion between the use of the expressions 'Cabinet Council' and 'Privy Council,' or at least to the transition of functions from one to the other that was taking place: 'The Earl of Scarsdale 'proposed the following question:—That it appears by 'the Earl of Sunderland's letter to Mr. Stanhope, that 'the design of an offensive war in Spain was approved 'and directed by the Cabinet Council.' But the mover afterwards substituted the word 'Ministers' for 'Cabinet Council,' as better known. Lord Cowper said, they were both terms of an uncertain signification, and the latter unknown to our law. Some contended that 'Ministers' and 'Cabinet Council' were synonymous, others that there might be a difference. Peterborough said 'he had heard a distinction between the Cabinet 'Council and the Privy Council; that the Privy Council 'were such as were thought to know everything, and 'knew nothing, and those of the Cabinet Council 'thought nobody knew anything but themselves.'[1]

Mr. Hallam says that during the reign of William 'this distinction of the Cabinet from the Privy Council, 'and the exclusion of the latter from all business of 'State, became more fully established. This, however, 'produced a serious consequence as to the responsibility 'of the advisers of the Crown; and at the very time 'when the controlling and chastising power of Parliament was most effectually recognised, it was silently 'eluded by the concealment in which the objects of 'its inquiry could wrap themselves.' He also notices that William III., from the reservedness of his dis-

[1] *Parl. Hist.* vi. 971. See Hallam *loc. cit.*

position, as well as from the great superiority of his capacity for affairs to that of any of our former kings, was far less guided by any responsible counsellors than the spirit of our Constitution requires.

The next stage in the development of the Cabinet Council is marked by the increased independence which it assumed, owing to the Sovereign withdrawing himself from taking any share in its deliberations. This state of things, again, was precipitated by the historical accident that George I. was unable to speak English. The transition period is described by Mr. Hallam. After noticing that William III. was truly his own Minister, and much better fitted for that office than those who served him, Mr. Hallam says: 'The King, 'according to our Constitution, is supposed to be pre-'sent in Council, and was in fact usually or very fre-'quently present, so long as the Council remained as a 'deliberative body upon matters of domestic and foreign 'policy. But when a junto or Cabinet came to super-'sede that ancient and responsible body, the King 'himself ceased to preside, and received their advice 'separately, according to their respective functions of 'Treasurer, Secretary, or Chancellor, or that of the whole 'Cabinet through one of its leading members. This 'change, however, was gradual; for Cabinet Councils 'were sometimes held in the presence of William and 'Anne, to which other councillors, not strictly of that 'select number, were occasionally summoned. But on 'the accession of the House of Hanover, this personal superintendence of the Sovereign necessarily came to an end. The fact is hardly credible that, George I. 'being incapable of speaking English, as Sir Robert Walpole was of conversing in French, the monarch

'and his Minister held discourse with each other in 'Latin.'[1]

This last change completed the development of the formal relationship which exists at the present day between the Cabinet on the one hand, and the Crown and Parliament on the other. But other important modifications, especially with respect to the internal constitution of the Cabinet, had yet to be made, and, in spite of the general even working of the Cabinet system during the present reign, it cannot be said that all controversy on some debateable points with respect to the relations of the different members of the Cabinet to one another and to the Prime Minister are finally set at rest. Sir George Cornewall Lewis, who occupied the positions of Chancellor of the Exchequer and of Home Secretary in Lord Palmerston's Governments of 1855 and 1859, has, in some of his lately published letters, explained at some length not only the true theory of the modern constitution of the Cabinet, but also the illogical and inconvenient results of advocating any rival theory. Addressing Mr. E. A. Freeman, and alluding to his 'History of Federal Government,' Sir G. C. Lewis writes on the 14th of February, 1863, as follows: 'It is here correctly stated that the English Cabinet 'has no legal existence, that is to say, the Cabinet has 'no corporate character; its decisions, as such, have no 'authority; it is merely a meeting of Ministers to dis-'cuss important business. But the statement in p. '230, that the Ministry has no legal existence, seems 'to me inaccurate. Every Minister has legal power to 'do acts relating to his own department, and is legally

[1] *Const. Hist.* vol. iii. p. 289. 7th edition.

'responsible for them. The Cabinet may discuss a 'despatch to be written to a foreign government, and 'may agree to it; but the Foreign Secretary has alone 'power to write the despatch, and he is alone responsi-'ble for it in a legal sense. A Minister who signed a 'treaty might be impeachable for the contents of the 'treaty, but his colleagues could not be impeached, although they might have agreed to it in the Cabinet. 'It is true, as is stated in p. 313, that our law does not recognise a Prime Minister; but somebody is responsible for every ministerial act. The reasons why votes of censure or of want of confidence have taken the place of impeachment are not the defect of legal responsibility, but the superior efficiency of the former 'remedy.'[1]

In another letter, Sir G. C. Lewis occupies himself with the political consequences which would result from any attempt to break up the unity of the Cabinet by an excessive distribution of responsibility. Writing to Mr. W. R. Greg, on the 27th of November, 1855, he says: 'You appear to assume that the Government is to 'be a government of departments, that each man is to 'do what seems best to himself in his own department, 'provided he can carry it in Parliament, even against 'the opposition of his colleagues. You put the case of 'a Foreign Minister, now, in favour of continuing the 'war, and a Chancellor of the Exchequer in favour of 'making peace. Now, in the first place it seems to 'me that your system would render meetings of the 'Cabinet useless or mischievous. Ministers would meet

[1] *Life and Letters of Sir G. C. Lewis*, p. 284.

'to dispute, and part to differ. Besides, how would it 'be safe to read confidential despatches before persons 'who were in communication with men of an opposite 'party, and would immediately go and disclose the in- 'formation? However, I will suppose that no Cabinets 'were held, and that each Minister acted for himself 'according to the best of his judgment. What I do not 'understand is, how a war could be conducted by a 'warlike Foreign Minister, if the Chancellor of the 'Exchequer was peaceful. He would say, I am against 'war; I think it impolitic and mischievous, and I shall 'prepare a peace Budget. When the estimates came 'in from the War Departments to the Treasury for 'approbation, he would withhold it unless they were re- 'duced to a peace scale. The same argument might 'be extended to every other department in succession. 'Nearly all new measures involve some question of 'expenditure—new salaries, new pecuniary arrange- 'ments of some kind. Suppose that the Colonial Secre- 'tary wished to give twenty millions for emancipating 'the negroes, but the Chancellor of the Exchequer 'opposed; he could not stir. It is this power of the 'purse which has made the First Lord of the Treasury 'the Prime Minister, and head of the Administration. 'In the manner in which Cabinets are now formed, he 'and the Chancellor of the Exchequer act together, and 'no difficulty arises. But if the Foreign Secretary were 'in favour of war, and the Chancellor of the Exchequer 'opposed it, and the Prime Minister supported either 'one against the other, the one whom he did not sup- 'port must go out. It seems to me that your plan 'would virtually abolish the office of Prime Minister.

'I do not see what power he would have with a set of 'colleagues who, on all the great subjects of the day, 'differed from him and from one another.'[1]

The combination of plurality of functions with unity of spirit and general management would seem to be, in the minds of the most authoritative recent writers on the subject, at once the leading characteristic and the most perplexing practical problem of the English Cabinet. In spite of his perhaps equivocal position as the most prominent member of one of the two existing political parties, Mr. Gladstone's observations on the essential idea and on the practical working of the Cabinet cannot but carry with them all the weight capable of being imparted by an unusually lengthened official experience and by an analytical capacity of the rarest kind. Mr. Gladstone's official experience extends over the thirty years intervening between the year 1844 and the year 1874; and, besides having been Prime Minister himself during a period of unusual legislative activity, he has served under such different leaders in office as Sir Robert Peel, Lord Aberdeen, Earl Russell, and Lord Palmerston. In an article published in the *North American Review* for September, 1878, obviously written for the purpose of commending, as well as expounding, English institutions, as contrasted with those of the United States, Mr. Gladstone notices that one characteristic of the English Ministry is the anomalous position of its chief, or Premier. It was probably owing to the great offices of State being thrown into commission, and, last among them, that of the Lord High Treasurer, after the time of Harley, Earl of

[1] *Life and Letters*, 1. 302.

Oxford, that the formation of a recognised headship in the Ministry was prevented or retarded. Departmentally, says Mr. Gladstone, he is no more than the first-named of five persons, by whom jointly the powers of the Lord Treasurer are to be exercised; he is not their master, or, otherwise than by mere priority, their head; and he has no special function or prerogative under the formal constitution of the office. He has no official rank, except that of Privy Councillor. Eight members of the Cabinet, including five Secretaries of State, and several other members of the Government, take official précedence of him. His rights and duties as head of the Administration are nowhere recorded. He is almost, if not altogether, unknown to the Statute Law. Contrasting the Cabinet with the Privy Council, Mr. Gladstone says that the former lives and acts simply by understanding, without a single line of written law or constitution to determine its relations to the Monarch, or to Parliament, or to the nation; or the relation of its members to one another, or to their head. It sits in the closest secresy. There is no record of its proceedings, nor is there anyone to hear them, except upon the very rare occasions when some important functionary, for the most part military or legal, is introduced, *pro hac vice*, for the purpose of giving to it necessary information.

For a theoretical view of the relations of the several members of a Cabinet to their chief, nothing could be more clear or constitutionally exact than the extract from the same paper of Mr. Gladstone's which is subjoined. The practical working of the theory is illustrated by notorious occurrences in 1851 and 1876.

'The nicest of all the adjustments involved in the

'working of the British Government is that which 'determines, without formally defining, the internal 'relations of the Cabinet. On the one hand, while each 'Minister is an adviser of the Crown, the Cabinet is an 'unity, and none of its members can advise as an indi-'vidual without,—or in opposition, actual or presumed, 'to,—his colleagues. On the other hand, the business of 'the State is a hundredfold too great in volume to allow 'of the actual passing of the whole under the view of 'the collected Ministry. It is therefore a prime office 'of discretion for each minister to settle what are the 'departmental acts in which he can presume the con-'currence of his colleagues, and in what more delicate, 'or weighty, or peculiar cases, he must positively 'ascertain it. So much for the relation of each Minister 'to the Cabinet; but here we touch the point which 'involves another relation, perhaps the least known of 'all, his relation to its head. The head of the British 'Government is not a Grand Vizier. He has no powers, 'properly so-called, over his colleagues: on the rare 'occasions, when a Cabinet determines its course by the 'votes of its members, his vote counts only as one of 'theirs. But they are appointed and dismissed by the 'Sovereign on his advice. In a perfectly organised 'administration, such for example as was that of Sir 'Robert Peel in 1841–6, nothing of great importance 'is matured, or would even be projected, in any depart-'ment without his personal cognisance; and any 'weighty business would commonly go to him before 'being submitted to the Cabinet. He reports to the 'Sovereign its proceedings, and he also has many 'audiences of the august occupant of the throne. He 'is bound, in these reports and audiences, not to counter-

work the Cabinet; not to divide it; not to undermine 'the position of any of his colleagues in the Royal 'favour. If he departs in any degree from strict 'adherence to these rules, and uses his great oppor- 'tunities to increase his own influence, or pursue aims 'not shared by his colleagues, then, unless he is prepared 'to advise their dismissal, he not only departs from 'rule, but commits an act of treachery and baseness. 'As the Cabinet stands between the Sovereign and the 'Parliament, and is bound to be loyal to both, so he 'stands between his colleagues and the Sovereign, and 'is bound to be loyal to both.'[1]

In a similar spirit Earl Grey, another modern constitutional authority who combines practical experience with that sort of intuitive sagacity which is essentially necessary for tracing the fine lines of division between the requirements of law, of morality, of expediency, and of courtesy, enforces the duties of unity in a Cabinet, and marks the limits of those duties, as follows: 'It 'is right, or rather it is absolutely necessary, that all 'the members of a Ministry should be guided by this 'feeling, [that, in considering any question brought 'before them, much deference is due to the opinion of 'the head of the Government, and to that of the chief 'of the department to which it relates,] because, unless 'the measures adopted in any of the principal branches 'of the public service are allowed to take their main 'direction and colour from a single mind, they must 'necessarily become marked with that character of 'feebleness and uncertainty always attaching to any 'important course of action, the successive steps of

[1] Gladstone's *Gleanings*, vol. i. p. 242.

'which are decided upon by several persons entertaining 'views not perfectly identical. So long therefore as 'there is no such difference upon great questions of 'policy, as to make it necessary that the members of a 'Cabinet should cease to act together, they best dis-'charge their public duty by generally acquiescing in 'what may be recommended by each Minister in his 'own department, after he has fully heard the opinions 'of his colleagues. Every Minister presiding over a 'great department ought to derive much assistance 'from the advice of his colleagues, and his own views 'must often be modified by theirs; and yet it ought 'seldom to happen, that the difficulty of obtaining their 'assent should prevent him from following the final 'dictates of his own judgment, when he has a decided 'opinion on any important question he may bring before 'the Cabinet. Injury to the public service is most apt 'to arise from the common responsibility of the mem-'bers of the Cabinet, when its chief, or the Minister 'entrusted with any department, throws himself too 'much on the assistance of others, and does not recom-'mend with sufficient decision what measures should be 'taken in pursuance of the policy he is charged with 'directing. The deliberations of a Cabinet seldom lead 'to a satisfactory result, when any question of difficulty 'is brought under its consideration by a Minister who 'is not prepared to lay before his colleagues some dis-'tinct opinion of his own. The true cause of questions 'being submitted to the Cabinet in this unsatisfactory 'manner, is sometimes to be found in the fact, that a 'difference of opinion on some great principle, or on 'some vital point of policy, really exists among the 'members of an Administration, though it is concealed

'for a time by a reluctance on both sides to come to a 'clear understanding on the subject. In such cases 'both parties are generally wrong in seeking to avoid, 'or to defer, a separation which ought, for the public 'good, to take place at once. Of two lines of policy, it 'often happens that either might succeed if steadily 'pursued, while failure is certain if neither is consistently 'pursued; and the conduct of the Government is sure 'to be marked by a want of consistency when the mem-'bers of an Administration, knowing that they could 'not agree, shrink from coming to a clear decision as 'to the course they are to adopt, and are content to 'determine separately each step that has to be taken, 'so long as it is possible to stave off a rupture by 'abstaining from any decided measure on the one side 'or on the other.'[1]

The position of Lord Palmerston in Lord John Russell's Cabinet in 1851 was one peculiarly likely to strain to the uttermost the theory of administrative independence on the one hand, and that of Cabinet unity on the other. In the words of his biographer, Mr. Ashley, 'Lord Palmerston, who had acquired a complete 'mastery over the business of his department, who 'always acted on a thorough conviction that his views 'were undeniably right, and who refrained from any 'interference in the internal policy of the country, was 'disposed to think that very great latitude within the 'sphere of his own attributes should be allowed to him. 'His notion was that a Foreign Minister ought to be 'strictly bound to pursue the policy of the Cabinet he 'belonged to, but that he ought to be left free to follow

[1] *Parliamentary Government and Reform.* By Earl Grey, 1864. P. 55.

'out that policy in the ordinary details of his office, 'without having every despatch he wrote submitted to 'criticism and comment.'[1] On the 2nd of December 1851, what is now usually known as the *coup d'état* of that year took place in Paris, the Assembly having recently met after the recess. On Tuesday, the 2nd, the leading members of the Opposition were arrested in their beds, and, in obedience to the commands of Louis Napoleon, the President of the Republic, a purely military rule was established, pending an appeal to universal suffrage as to the future government of France. The event was known in London the next day, and Count Walewski, the French ambassador, called that day (the 3rd) upon Lord Palmerston to inform him of what had taken place. Lord Palmerston had already formed a strong individual opinion that such a state of antagonism had arisen between the President and the Assembly that it was becoming every day more clear that their co-existence could not be of long duration; and it seemed to him (as he expressed it in a letter written on the 6th to Lord Normanby) 'better for the interests 'of France, and through them for the interests of the 'rest of Europe, that the power of the President should 'prevail, inasmuch as the continuance of his authority 'might afford a prospect of the maintenance of social 'order in France, whereas the divisions of opinions and 'parties in the Assembly appeared to betoken that their 'victory over the President would only be the starting-'point for disastrous civil strife.' Lord Palmerston also believed that it was the intention of the leaders of the majority of the Assembly,—if a proposed law had been

[1] *Life of Henry John Temple, Viscount Palmerston*, 1846–1865. By the Hon. Evelyn Ashley, M.P. Vol. i. p. 281.

carried, which declared it high treason in an existing President to take any steps to secure his re-election,—immediately to have arrested within the walls and on the spot such of the Ministers as were members, among whom was the Minister of War, and to have also endeavoured to send the President to Vincennes. In an interview with Count Walewski on the 3rd, Lord Palmerston stated in the course of conversation the view which he held as to the necessity and advantage for France and Europe of the decisive steps taken by the President; and Count Walewski at once communicated to the French Foreign Office the tenor of what Lord Palmerston had said to him. On the 5th of December Lord Palmerston sent a formal despatch from the Foreign Office to Lord Normanby, the British Representative in Paris, in which he reported that he had received and laid before the Queen a despatch from Lord Normanby of the 3rd, requesting to be furnished with instructions for his guidance in the present state of affairs in France. 'I am commanded,' wrote Lord Palmerston, 'by Her Majesty, to instruct your Excellency 'to make no change in your relations with the French 'Government. It is Her Majesty's desire that nothing 'should be done by her Ambassador in Paris which 'could wear the appearance of an act of interference of 'any kind in the internal affairs of France.' On the receipt of this despatch, Lord Normanby hastened to M. Turgot, the French Minister for Foreign Affairs, in order to communicate to him the purport of this despatch. M. Turgot, somewhat piqued, as it would seem, by the general unfriendly language towards Louis Napoleon used by Lord Normanby, replied that the communication was unnecessary, as M. Walewski had

already informed him that Lord Palmerston entirely approved of what the President had done. Lord Normanby reported this statement home, in a despatch of the 6th; and recurred to the subject in another despatch on the 15th, in which he complained as follows: 'If 'the language held in Downing Street is more favour- 'able to the existing order of things in France than the 'instructions on which I am directed to guide myself 'on the spot, it must be obvious that by that act of your 'Lordship's I become subject to misrepresentation and 'suspicion in merely doing my duty according to the 'official orders received through your Lordship from Her 'Majesty.'

The events which followed upon this correspondence, the different views taken of them by Lord Palmerston and by Lord John Russell, and the nature of the constitutional question at issue in respect to the duties of a Secretary of State towards the Prime Minister and towards the Sovereign, will be fully understood from the following brief extract from a letter of Lord Palmerston's to his brother, which is given in Mr. Ashley's biography, and from some quotations from the speeches which were made in the House of Commons on the reassembling of Parliament in February.

Writing on the 22nd of January, 1852, to his brother, Lord Palmerston recalled the circumstances of the correspondence, and said that Lord John Russell had written to him to say that he hoped he should be able to contradict the report of what he had said to Count Walewski. 'To this I replied that the particular 'expressions ascribed to me were rather a highly coloured 'version of what I had said, but that it must be remem- 'bered that Normanby reported what Turgot had said

'to him verbally; that Turgot stated from memory 'what Walewski had written in a despatch or letter 'received two days before; and that Walewski gave the 'impression which he had derived from our conversa- 'tion, but not the particular words which I had used. 'But I stated to John Russell, at considerable length, 'my reasons for thinking that what had been done was 'the best thing for France and for Europe. To this 'John Russell replied, that I mistook the point at issue 'between us. That the question was not whether the 'President was or was not justified in doing what he 'has done, but whether I was justified in expressing 'any opinion thereupon to Walewski without having 'first taken the opinion of the Cabinet on the matter. 'To this I answered that his doctrine, so laid down, was 'new and not practical. That there is a well known 'and perfectly understood distinction in diplomatic in- 'tercourse between conversations which are official and 'which bind Governments, and conversations which are 'unofficial and which do not bind Governments. That 'my conversation with Walewski was of the latter de- 'scription, and that I said nothing to him which would in 'any degree or way fetter the action of the Government; 'and that if it was to be held that a Secretary of State 'could never express any opinion to a foreign Minister 'on passing events, except as the organ of a previously 'consulted Cabinet, there would be an end of that easy 'and familiar intercourse which tends essentially to 'promote good understanding between Ministers and 'Governments. John Russell replied to this that my 'letter left him no alternative but to advise the Queen 'to place the Foreign Office in other hands.' In the following passage in the same letter, Lord Palmerston

further defends his conduct on the ground that Count Walewski had talked freely with Lord John Russell and with other Ministers about the same time in reference to the same events, and that they had all discussed the matter without restraint. At a party at Lord Palmerston's house on the 4th, Lord John Russell and Walewski were present, 'and they had a conversation on the 'coup d'état, in which Johnny expressed his opinion, 'which Walewski tells me was in substance and result 'pretty nearly the same as what I had said the day 'before, though, as he observed, John Russell is not so 'expansif as I am; but further, on Friday, the 6th, 'Walewski dined at John Russell's, and there met 'Lansdowne and Charles Wood; and in the course of 'that evening John Russell, Lansdowne, and Charles 'Wood all expressed their opinions on the coup d'état, 'and those opinions were if anything rather more 'strongly favourable than mine had been.'[1]

In the debate in the House of Commons on the 3rd of February, 1852, Lord John Russell rested his case as against Lord Palmerston not so much on the discrepancy between Lord Palmerston's official communication to Lord Normanby and his extra-official conversation with Count Walewski, as upon a wholly different ground, that of a want of strict compliance with the requirements of the Queen herself, as already somewhat peremptorily expressed in a communication from Her Majesty made in August, 1850. It will be convenient to consider this part of the subject a little later on, in connection with the general relations of the Sovereign to the Ministers of the Crown. So far as the historical

[1] *Life of Lord Palmerston*, vol. i. chap. vii.

circumstances here related, which resulted in the dismissal of Lord Palmerston, illustrate the duties of a head of a department towards his chief, it must be admitted that Lord Palmerston made good his case. Unless there is ground for general want of confidence, or such a diversity of political opinion as would itself suffice to separate a Minister from the Cabinet, it would be wholly unworthy of the independence and dignity of a Minister, and most of all of a Minister who must be presumed to possess such special qualifications and exceptional experience as a Foreign Secretary, to allow his language or actions to be further fettered than they are of necessity by the formal communications which he prepares and addresses, either at the direct bidding of the Cabinet, or with the intention of expressing their well-known policy. Of course, in such a case as the above, an undue sympathy with Louis Napoleon in his consummation of the *coup d'état* might in certain political crises have been held of itself a sufficient exhibition of divergent political sympathy to justify a Prime Minister in expostulating with, or even dismissing, a Secretary of State. But in the actual case described, the complaint was not of the importance of the discrepancy of opinion between the Prime Minister and the Secretary of State, but only of the latitude of private speech which it was imputed to Lord Palmerston that he had permitted to himself. Lord Palmerston might well allege in his speech in the House of Commons that the restriction attempted to be imposed would have the anomalous, not to say ludicrous, result, that 'every member of the 'Cabinet, whatever his political avocations may have 'been, however much his attention may have been de-

'voted to other matters, is at liberty to express an 'opinion of passing events abroad; but the Secretary 'of State for Foreign Affairs, whose peculiar duty it is 'to watch those events, who is unfit for his office if he 'has not an opinion on them, is the only man not per- 'mitted to express an opinion; and when a foreign 'Minister comes and tells him that he has news, he is 'to remain silent, like a speechless dolt, or the mute of 'some Eastern Pasha.'[1]

It happens that the subject of Foreign Affairs has lately led to still further practical illustrations of the nature of the concert demanded of one another by a Prime Minister and the members of his Cabinet. The account of the resignations, in 1876, of Lord Carnarvon and of Lord Derby, because of their divergency of opinion from the rest of the Cabinet in respect of contemplated acts resolved upon by the Cabinet in the course of the negotiations during the late Russo-Turkish war, which terminated in the Berlin Treaty of 1877, supplies instances both of the limits of practical co-operation now insisted upon in the organisation of a Cabinet, and also of the limits of the secresy imposed on members of the Cabinet. On the 25th of January, 1878, Lord Carnarvon announced in the House of Lords his resignation of the office of Secretary of State for the Colonies in the following terms:

'My Lords, explanations of this sort are painful to 'make. It is necessary, on the one hand, for a Minister 'to say enough to justify himself in the course which 'he feels it his duty to adopt; and, on the other hand, 'it is equally incumbent upon him not only to avoid

[1] *Life of Lord Palmerston*, vol. i. p. 323.

'saying anything that can embarrass Her Majesty's 'Government at a period of critical negotiations, but 'as far as is possible to say nothing that can give rea- 'sonable offence, or that seems to impute unnecessary 'blame to those who have been his colleagues and 'his friends. My Lords, in the peculiar position in 'which I am placed I am precluded from entering 'into one important branch of that self-justification, 'because, looking to the critical nature of present or 'possible negotiations, I do not consider it right to say 'a single word with regard to those communications of 'a confidential character which have passed between 'Her Majesty's Government and foreign nations. If, 'therefore, the course of my conduct as now explained 'by me seems incomplete, I shall be content to accept 'the burden and responsibility of that incompleteness.' After noticing the two reasons which induced him finally to dissent from the rest of the Cabinet—namely, the extraordinary grant of money for which the Chancellor of the Exchequer was about to move, and the decision of the Cabinet to send the fleet to Constantinople—Lord Carnarvon said that he had Her Majesty's gracious permission for any statement that he might think it necessary to make on the subject. On the 3rd of January, in the Cabinet, the Prime Minister thought himself at liberty to condemn very severely the language that he had used to a deputation on the 2nd of January about the war and the general attitude of Her Majesty's Government. Lord Carnarvon said that he took time to consider the course that it was his duty to take; and then, in a memorandum which he had drawn up, he recapitulated what had passed, and, having vindicated the position

which he had taken, he reaffirmed, in the hearing of his colleagues, and without any contradiction, the propositions that he had then laid down. Between the 12th and the 23rd, the Cabinet twice changed its mind with regard to sending the fleet to the Dardanelles. On the 15th Lord Carnarvon wrote to Lord Beaconsfield that he would resign as soon as the fleet should sail. When, on the 18th, the plan was again changed, Lord Beaconsfield wrote: 'I shall not submit your resigna-'tion to Her Majesty. Such an act would deprive me 'of a colleague I value, and at any rate should be 'reserved for a period when there is an important dif-'ference between us, which at present does not seem to 'be the case.' On the 23rd the Cabinet decided to send the fleet to Constantinople, and Lord Carnarvon resigned.'[1]

In announcing his resignation of the office of Secretary of State for Foreign Affairs, Lord Derby, addressing the House of Lords on March the 28th, 1878, said he had received from Her Majesty and from his noble friend at the head of the Government full permission to use his own discretion in the matter of explaining to Parliament the character and nature of the differences which had arisen between him and his colleagues. 'But,' said Lord Derby, 'your Lordships will easily 'understand that in the present state of our foreign 'relations there are many things which require to be 'considered and decided upon by those who are respon-'sible for the conduct of public affairs, which it is not 'in the interest of the State should be made public at 'the time when the decision upon them is taken. My

[1] *Hansard*, ccxxxvii. 436.

'Lords, the Cabinet have arrived at certain conclusions 'which no doubt are of a grave and important charac- 'ter. In the measures which they propose I have not 'been able to concur. We agree as to the end, but, 'unhappily, we differ as to the means; and I cannot, 'in the exercise of my deliberate judgment,—however 'willing and anxious I may be to submit that judgment 'to what I know to be in many respects the better 'judgment of my colleagues,—I cannot consider the 'measures upon which they have decided as being pru- 'dent in the interests of European peace, or as being 'necessary for the safety of the country, or as being 'warranted by the state of mat'ers abroad. My Lords, 'when the concurrence of Parliament is asked for those 'measures of which I have spoken, I shall be ready, if 'necessary, to vindicate the opinion which I have èn- 'tertained; but, until then, I consider I am bound by 'public duty to speak only in the most general terms, 'leaving to those who are responsible for the manage- 'ment of public affairs the choice of the time and the 'manner in which they will think it their duty to bring 'them before your Lordships.'[1]

On a later day, when these events were again under discussion in the House of Lords, Lord Derby said: 'Three months ago, when I quitted the Cabinet, it was 'on account of the decision then taken—namely, that 'it was necessary to secure a naval station in the Eastern 'part of the Mediterranean, and that for that purpose 'it was necessary to seize upon and occupy the Island 'of Cyprus, together with a point on the Syrian Coast. 'This was to have been done by a secret naval expedi-

[1] See *Hansard*, ccxxxix. 101.

'tion sent out from England, with or without the consent of the Sultan, although a part of the arrangement was that full compensation should be made to the Sultan for any loss of revenue he might sustain. . . . My Lords, I endeavoured to induce the Cabinet to reconsider this determination, and from whatever cause the change took place, I am heartily glad that that resolution was modified. My Lords, I need hardly say that my lips were closed on this subject so long as negotiations were going on. I have heard the most extravagant and improbable reasons assigned out of doors for my retirement; but now that the matter is settled, and that no harm can be done by stating what is really an historical fact, I thought it due to myself and to your Lordships to avail myself of the discretion given to me—as it is always given to an outgoing Minister—to state what really happened.'

In the course of the debate Lord Salisbury compared the 'instalments of revelations' he described Lord Derby as having made to the successive disclosures of Titus Oates, and said: 'I would venture to point out that there is a great inconvenience in these revelations from the interior of the Cabinet. Of course my noble friend must treat his own obligations in the spirit which pleases himself; but I do not know that I should like to announce as broadly and palpably as my noble friend has to the world, that any person who hereafter serves with him in the Cabinet must be prepared to have anything that passes, or is supposed to pass, there produced ultimately, in spite of the rule which Privy Councillors have hitherto observed.' To this Lord Derby replied: 'When a Minister unfortunately feels himself obliged

'to separate from his colleagues, I do not think it can 'reasonably be contended that he is not free to state 'the grounds on which the difference of opinion arose. 'It has been an invariable rule that he should do so; 'and it is quite clear that if that were not the rule, no 'man's reputation when he retired from the Cabinet 'would be capable of vindication from attacks made 'upon it. It is perfectly right that he should suffer 'considerable risk of misconstruction and misinterpre-'tation until a time when no public injury would arise 'from that difference of opinion being known; but 'when that time has arrived, he has a duty towards his 'own character and towards the public.'[1]

The necessity for the secresy which is held to be binding on all members of the Cabinet, in their capacity of Privy Councillors, has lately attracted attention from a point of view not purely political. The Lord Chief Baron of the Exchequer (Kelly) had publicly announced the grounds of his dissent from a judgment to which he was formally held to be a party, as a member of the Judicial Committee of the Privy Council, before which an ecclesiastical appeal had been brought. This violation of the secresy alleged to be incumbent on all Privy Councillors, in their judicial as well as their consultative capacity, gave rise to a vehement controversy, in which the Lord Chancellor (Cairns) took an active share adversely to the Lord Chief Baron, and was the main author of the publication of a new Order in Council, reinforcing the obligation of secresy, which is known as the Order of the 4th of February, 1878. In consequence of this somewhat hostile proceeding, the Lord

[1] *Hansard*, ccxli. 1792.

Chief Baron addressed a Letter to the Lord Chancellor, which must be taken as a memorable document for the purpose of tracing the origin and development of the obligation of secresy imposed on Privy Councillors in the discharge of all their functions. The historical arguments of the Lord Chief Baron are in fact invincible; and if the stringent obligation of secresy, in judicial matters at least, is to be maintained, it must be supported by a reference to its continual utility and not by a mere appeal to an imaginary tradition. In his Letter the Lord Chief Baron traces the obligation of secresy no further back than the Ordinance of the 20th of February, 1627. The fourth clause of this Ordinance is: 'When any three of the Lords are 'assembled in the Council Chamber, all suitors, attendants, and others are to avoid the Chamber; and it is 'to be kept private, both for dignity, and that the 'Lords may for privacy confer together before they sit 'as occasion shall be.' The eighth clause is: 'In debate upon all business there is to be freedom and 'secresy used. Every one is to speak with respect to 'the other, and no offence to be taken for any unfitting 'advice delivered, but as little discourse or repetition 'to be used as may be, for saving of time; and when 'any Lord speaks at the Board to the Council he is to 'be uncovered; but if he speaks to any other man to 'be covered.' The eleventh clause is: 'In voting of 'any cause the lowest Councillor in place is to begin to 'speak first, and so it is to be carried by most voices, 'because every Councillor hath equal vote there; and 'when the business is carried according to most voices, 'no publication is afterwards to be made by any man 'how the particular opinions and voices went.' Sir

Fitzroy Kelly relates, that on the very day of the date of the Ordinance, the 20th of February, a number of defaulters in the contribution to a forced loan in Essex, by an Order of the day before, were compelled to appear before the Privy Council; and from this time every subject of the realm throughout England was ordered, under various commissions, to contribute to a general forced loan or benevolence; and of these, great numbers who refused to contribute were at once imprisoned, under Orders of the Privy Council. The Judges were further compelled to attend the Privy Council, and coerced into an apparently unanimous Report that the King might lawfully levy this money without the authority of Parliament; though some of them afterwards, when the question came before them in open court, declared that they had dissented from the Report, and held it to be contrary to law. At length, by the King's command, many Members of Parliament were compelled to appear before the Privy Council, and were questioned as to speeches which they had made in the House of Commons; and whenever it appeared by their own admission, or by proof adduced before the Lords of the Council, that they had spoken in what was called derogation of the King's prerogative, or against the exaction of forced loans, or the levying of ship-money, they were at once condemned to imprisonment, and some of them were kept in prison until released under the Petition of Right. In fact, Sir Fitzroy Kelly establishes the position that the Ordinance of 1627, on which alone the principle of secresy, as distinguishable from the duties imposed by the Privy Councillor's oath of secresy, rests, was only part of the iniquitous and now confessedly unconstitutional organi-

sation by which King Charles I. for a time succeeded in evading his dependence upon Parliament, and in robbing his people of their property without even resorting to the formalities of any recognised legal usage.[1]

The main purpose of Sir Fitzroy Kelly's argument, indeed, is to show that, even were the principle of secresy in the Privy Council inviolable in what may be called the consultative aspect of the Council, it is still wholly alien to the spirit of English law and justice to extend the principle to the Council in its judicial aspect; and that such an extension would involve the unrighteous scandal and the practical inconvenience of giving decisions without incurring the responsibility involved in alleging the grounds of them. But much of Sir Fitzroy Kelly's argument serves to explain the political principle of secresy as applicable to the members of a modern Cabinet. When once, as in Lord Derby's case, the Sovereign has relieved the Privy Councillor from the obligations of his oath, it then becomes a mere matter of individual discretion as to how much he shall communicate to the public. Thus Lord Derby might without impropriety have been charged with a breach of discretion or political prudence, or even with disloyalty to his party, but there could have been no ground for imputing to him a breach of a principle of secresy thus seen to be wholly accidental in the constitution of the Privy Council and the Cabinet.

The mode in which the institution of the English Cabinet has been developed of late, and its internal

[1] 'A Letter to the Lord High Chancellor upon the late Order in Council of the 4th of February, 1878, by the Lord Chief Baron of the Exchequer,' 1878.

constitution at the present moment, having been explored, it now remains to consider what is the true constitutional attitude of the Sovereign towards the Cabinet Ministers, so far as that attitude can be discerned from a careful study of the most recent history. It happens that not only do the reigns both of William IV. and her present Majesty supply copious illustrations of the position relative to each other of the Sovereign and the Ministers of the Crown, but in the case of both these Sovereigns documentary evidence of an unprecedented sort is in existence, from which the historical inquirer is able to ascertain what was the view of their constitutional relations which these Sovereigns severally have theoretically held, and, to some extent at least, practically acted upon.

The relations of the Sovereign to the Ministers of the Crown are indicated, 1, in the mode of selecting those Ministers, 2, in the mode of dismissing them, 3, in the limits of intervention in the official conduct either of the Ministry as a whole or of individual Ministers, and, 4, in the independent action of the Sovereign, with little or no reference to the concurrence, co-operation, or even the knowledge, of the Ministers.

1 2. It is not easy in theory to impose any bounds on the liberty of action of the Sovereign with respect to the selection or dismissal of Ministers. On the one hand, it could not be expected that the Sovereign should continue to engage in amicable correspondence and even incessant communication with a Minister who, on whatever grounds, had rendered himself personally odious; nor, on the other hand, could the Sovereign obtain any advantage by retaining in his service a Minister who commanded no confidence

whatever in either House of Parliament. Admitting, then, that if the Sovereign is to retain any independent functions at all, he must have a certain amount of liberty left him in the choice of those who are called upon to co-operate with him, it remains to be seen how far the Sovereign is entitled to exercise this choice in deference to a mere personal caprice on the one hand, or to personal and private conceptions of the public advantage on the other. At the time of the dissolution of a Ministry, there is seldom more than a very narrow field of selection open to the Sovereign for the nomination of a Prime Minister who shall at once command the general confidence of Parliament, and be able to combine with himself a number of adherents to fill the several official departments in the Government. Where the Sovereign is in any perplexity in making his choice, the practice has of late been either to resort to the advice of some experienced counsellor, who may be supposed to be personally removed from the arena of party conflict, or to be superior to the coarser passions aroused by these conflicts (such as was, or seemed to be, the Duke of Wellington in the earlier part of the present reign), or to consult the outgoing Prime Minister as to the state and prospects of parties in Parliament, or to make tentative overtures to a series of prominent statesmen in order to see which among them can alone, at the time, form a Government. The following extract from the Duke of Buckingham's memoirs, giving a brief report of her present Majesty's selection of Sir Robert Peel as her Prime Minister to succeed Lord Melbourne in 1839, represents what has been the customary practice of the present reign. 'Sir Robert Peel had an interview with the Queen, when Her Majesty repeated

'that she had parted with her Ministers with great 'regret, acknowledging that they had given her entire 'satisfaction; and stated that, as it had become neces- 'sary to take some step towards the formation of 'another administration, she had sent for him at the 'suggestion of the Duke of Wellington. The conver- 'sation that followed has not been reported, but Sir 'Robert subsequently in the House of Commons affirmed 'that no one could have expressed more fully, more 'naturally, or more becomingly, the regret which Her 'Majesty felt for the loss of her late advisers, or prin- 'ciples more strictly constitutional with respect to the 'formation of a new Government.'[1]

The history of William IV.'s reign exhibits some extreme instances of the active interference of the Sovereign in the selection and dismissal of Ministers, on grounds not, presumedly, of personal caprice, but of independent views of public utility. In the Memoirs of Baron Stockmar there is published for the first time a remarkable document written by King William IV. himself, in the year 1835, and purporting to be 'A 'Statement of His Majesty's general proceedings and of 'the principles by which he was guided from the period 'of his accession in 1830 to that of the recent change 'in the administration, January 14, 1835.' The King relates that upon his accession to the throne he determined without any hesitation 'to maintain in the 'administration of the affairs of the country those who 'had been the confidential servants of his late brother;' and that on the resignation, in 1830, of that Govern-

[1] *Memoirs of the Courts and Cabinets of William IV. and Victoria.* By the Duke of Buckingham and Chandos. Vol. ii. p. 384.

ment, headed by the Duke of Wellington, His Majesty was advised by the Lord Chancellor to address himself to Earl Grey, who consented to take upon himself the trust proposed on the condition that a measure for the extensive reform of Parliament should receive the King's countenance and support. On Lord Grey and his colleagues bringing forward a proposition for an increase of the Peerage 'which appeared to His Majesty 'so unreasonably extensive, so injurious to the charac-'ter of that branch of the Legislature, and so degrading 'in its effects to the aristocracy of the country,' that the King refused to acquiesce in it, the Government resigned, and His Majesty sent for Lord Lyndhurst, the late Lord Chancellor, and 'requested him to communi-'cate with the Duke of Wellington and others who 'might be disposed to come to his assistance and to 'attempt to form an Administration.' After some ineffectual attempts to accomplish the purpose, the Duke of Wellington and Lord Lyndhurst stated to His Majesty that their endeavours had become hopeless, and 'advised His Majesty to resort again to Earl Grey, 'and to make the best terms he could with him with 'respect to the Peerage question, if his Lordship should 'consent to return to the direction of his counsels.' When Earl Grey resigned, in 1834, it occurred to the King 'that advantage might be taken of this state of 'affairs to effect a union of parties, of which the object 'should be Conservative, and this became the subject 'of communications to Lord Melbourne, and through 'him to the Duke of Wellington, Sir Robert Peel and 'Mr. Stanley.' 'After fully weighing every contin-'gency, he determined to entrust to Viscount Mel-'bourne, whom he had employed in the communications,

'the reconstruction of the Administration.' The King then gives an account of one of the most remarkable pieces of modern history in respect to the relation of the Sovereign to the Ministers of the Crown,—that of his peremptory dismissal of Lord Melbourne's Government in 1834, in spite of their having constant majorities in the House of Commons. The death of Lord Spencer on the 10th of November, and the consequent elevation to the House of Lords of Lord Althorp, the Chancellor of the Exchequer, led to Lord Melbourne's proposing that Lord John Russell should succeed Lord Althorp as leader of the House of Commons. 'His 'Majesty objected strongly to Lord John Russell; he 'stated, without reserve, his opinion that he had not 'the abilities nor the influence which qualified him for 'the task, and observed that he would make a wretched 'figure when opposed by Sir Robert Peel and Mr. 'Stanley.' The King objected equally, if not more, to Mr. Abercrombie; and Lord Melbourne persisted in urging the nomination of Lord John Russell. 'But 'His Majesty had further objections. He considered 'Lord John Russell to have pledged himself to certain 'encroachments upon the Church, which His Majesty 'had made up his mind and expressed his determina-'tion to resist.' 'Nor did His Majesty conceal from 'Lord Melbourne that the injudicious and extravagant 'conduct of Lord Brougham had tended to shake his 'confidence in the course which might be pursued by 'the Administration of which he formed so prominent 'and so active a feature, and in its consistency.' Finally, His Majesty made up his mind to communicate to Lord Melbourne 'his regret that circumstances did not in his opinion justify his sanctioning the arrange-

'ment he had proposed, or the continued existence of 'an Administration so situated; and this intimation 'was reduced to writing, to prevent any misconception, 'and in order that His Majesty might relieve himself 'from the embarrassment of the verbal opening of a 'painful communication.' The King adds, that he 'knows that it is, or has been, the opinion of some that 'he has acted prematurely, and that if he had agreed 'to the arrangement proposed by Lord Melbourne 'the Administration would have fallen to pieces 'and dissolved itself soon after the opening of Parlia-'ment.'[1]

The following words of Lord Palmerston, cited in Baron Stockmar's Memoirs, and reproduced in Mr. McCullagh Torrens' Life of Lord Melbourne, give a summary view of the real facts of this dismissal.

'The Government, therefore,' writes Lord Palmerston, 'have not resigned, but are dismissed; and they 'are dismissed not in consequence of having proposed 'any measure of which the King disapproved, and 'which they nevertheless would not give up, but be-'cause it is thought they are not strong enough in the 'Commons to carry on the business of the country, and 'their places are to be filled by men who are noto-'riously weak and unpopular in the Lower House, how-'ever strong they may be in the Upper one. It is 'impossible not to conclude that this is a preconcerted 'measure, and therefore it may be taken for granted 'that the Duke of Wellington is prepared at once to 'undertake the task of forming a Government.'[2]

[1] *Memoirs of Baron Stockmar*, vol. i. p. 314.

[2] *Memoirs of Baron Stockmar*, vol. i. p. 309. Also *Memoirs of Lord Melbourne*, vol. ii. p. 38.

Mr. Gladstone is one of the most recent critics of William IV. in these transactions, though, in estimating the constitutional character of the King's act, he hardly displays his customary refinement of analysis in distinguishing the kind of formal legality which is mentioned in text-books of law, and can alone be tested in courts of justice, from the true constitutional legality which is outraged if that is done in a single instance which, if often repeated, must entirely impair the nature and working of the Constitution.

'The endeavour of King William IV., in 1834, to 'assert his personal choice in the appointment of a 'Ministry without reference to the will of Parliament, 'gave to the Conservative party a momentary tenure of 'office without power. But, in truth, that indiscreet 'proceeding of an honest and well-meaning man pro- 'duced a strong reaction in favour of the Liberals, and 'greatly prolonged the predominance which they were 'on the point of losing through the play of natural 'causes. Laying too great a stress on the instrument 'of Royal will, it tended not to strengthen the Throne, 'but to enfeeble it. Such was the upshot of an injudi- 'cious, though undoubtedly conscientious, use of power.'[1]

'There is, indeed, one great and critical act, the 'responsibility for which falls momentarily or provi- 'sionally on the Sovereign; it is the dismissal of an 'existing Ministry, and the appointment of a new one. 'This act is usually performed with the aid drawn from 'authentic manifestations of public opinion, mostly such 'as are obtained through the votes or conduct of the 'House of Commons. Since the reign of George III.

[1] *Gleanings of Past Years*, vol. i. p. 38.

'there has been but one change of Ministry in which 'the Monarch acted without the support of these 'indications. It was when William IV., in 1834, dis- 'missed the Government of Lord Melbourne, which 'was known to be supported, though after a lukewarm 'fashion, by a large majority of the existing House of 'Commons. It can hardly be said that the King's 'initiative left to Sir R. Peel a freedom perfectly un- 'impaired. And, most certainly, it was a very real 'exercise of personal power. The power did not suffice 'for its end, which was to overset the Liberal predomi- 'nance; but it very nearly sufficed. Unconditionally 'entitled to dismiss the Ministers, the Sovereign can, 'of course, choose his own opportunity. He may defy 'the Parliament, if he can count upon the people. 'William IV., in the year 1834, had neither Parliament 'nor people with him. His act was within the limits 'of the Constitution, for it was covered by the respon- 'sibility of the acceding Ministry. But it reduced the 'Liberal majority from a number considerably beyond 'three hundred to about thirty; and it constituted an ex- 'ceptional, but very real and large action on the politics 'of the country, by the direct will of the King. I speak 'of the immediate effects. Its eventual result may have 'been different, for it converted a large disjointed mass 'into a smaller but organised and sufficient force, which 'held the fortress of power for the six years 1835–41. 'On this view it may be said that, if the Royal inter- 'vention anticipated and averted decay from natural 'causes, then, with all its immediate success, it defeated 'its own real aim.'[1]

[1] *Gleanings of Past Years*, vol. i. p. 231.

It is obvious that the claim set up by William IV. was no less than a claim despotically and irresponsibly to dismiss any Ministry which would not pledge itself to advocate a policy of which the King personally approved, and to select in its place a Ministry which would so pledge itself. The result of a course of conduct such as this must be, to make the Sovereign a far more potent factor in the working of the Constitution than could be compatible with the free action of the two Houses of Parliament. The claim is one, indeed, which had been set up in a far more noxious form by so recent a Sovereign as George III.; and there were abundant precedents for the same claim in earlier history. But the whole movement of the Constitution up to 1834 had been in the direction of preferring the automatic action of the Houses of Parliament to the automatic action of the Sovereign. Of course, there might be crises when, owing to contests between the two Houses of Parliament, or to the fact of the House of Commons at the moment not really representing public opinion outside, a wary and astute Sovereign could not but succeed, even while complying with the form and spirit of the Constitution, in making his own personal will prevalent over all competing forces. But no statesman would recommend, nor political theorist erect into an ideal, a condition of things as permanent which could only draw its justification from precedents afforded by the accidental advantage obtained, either by the Sovereign or by the Houses of Parliament, in a spasm or chaos of a wholly exceptional kind. Did such periods of strained differences between the two Houses, or want of conformity between the representative House and the electoral body, become lengthened, or threaten to be permanent, the Constitu-

tion itself must undergo a vital change. But it is only on such an hypothesis that any justification can be found for conjuring up so violent a mechanism for governing the country in spite of the ascertained will of the House of Commons, and the substitution for that will of the will of the Sovereign. Even could the theory implicitly advocated by those who would call the conduct of William IV. legal be compatible with the working or existence of the Constitution, it is needless to point out how politically vicious it must be to substitute the possibly immature, uninformed, or prejudiced opinion of an hereditary Prince for the deliberate will of the country, as expressing itself in an incalculable number of more or less organised and articulate forms. That the act in question was at the best a constitutional anomaly, and such as could never bear repetition, even in what are called bad times, is proved from the utter disuse of such an exercise of the prerogative during the present reign, even when the interest of the Queen and the late Prince Consort in the strife of political parties,—not to say in the triumph of one party over another,—was as active as it well could be. The Prince Consort was a specimen of what may be looked for in a mind carefully trained and habituated to the duties of active kingship, and he was not without a knowledge of the limits of such activity in kingship imposed by the English Constitution. His direct practical concern in every political step taken or contemplated by the Government of the day, was unintermittent; and, as has been seen in a previous part of this chapter, the only defence of his position as a gratuitous counsellor of the Government was that he directly personated the Queen, and his acts must be

looked upon as indistinguishable from hers. Nevertheless, in all the political crises which occurred during the period of his married life,—not excepting those of the Crimean War, in which Court intervention in administrative affairs far exceeded the limits of discretion, if not of right,—there is no sign that the notion of directly superseding the Government of the day, irrespectively of the vote and will of the House of Commons, ever even suggested itself to the Queen or the Prince. Had it suggested itself, and been for a moment entertained, or even had a rumour got abroad that such a notion was afloat in Court circles, there is no doubt that the watchful jealousy with which the influence of the Prince Consort was habitually regarded would have expressed itself in a form and with a determination for which constitutional history since the time of James II. scarcely affords a parallel.

3. The topic of the right of intervention on the part of the Sovereign in the conduct of the Ministers of the Crown has been to some extent anticipated in the preceding remarks. But while it may be admitted that the dismissal of a Government which still enjoys the favour of the House of Commons may be entirely outside the limits of the Sovereign's right, it must still be matter of question how far the Sovereign is entitled to refuse to retain in his service any particular Minister, or to control in a variety of ways, direct and indirect, the policy of the Cabinet. It has already been hinted that it would be unreasonable to expect the Sovereign to continue to hold communication with a Minister who, on purely personal grounds, had rendered himself obnoxious; and the test of the degree of animosity existing between a Sovereign and a Minister which

would morally, and therefore constitutionally, justify the Sovereign in dismissing the Minister, is one of those matters, peculiarly characteristic of this subject generally, which cannot be mathematically defined by law or language, but must be measured by the somewhat rude though not insufficient mechanism of public opinion and traditional custom. The main difficulty arises when the grounds of objection to a Minister are partly private and partly public; or rather when an alleged persistence in some course of action connected with the discharge of public business, and yet accidentally obnoxious to the Sovereign, becomes a matter of personal irritation or pique. The treatment of Lord Palmerston by the Queen in 1850 supplies an instance of this critical state of things; and in weighing the case of Lord Palmerston against the Queen, the judgment on the constitutional right of dismissal,—not indeed at that time carried into effect,—will differ according as it is believed that the requirements of the Queen were or were not needlessly or even impracticably punctilious.

Early in 1849, Her Majesty thought it necessary to call the attention of Lord Palmerston, then Foreign Secretary, to the principle that the ultimate control of his office rested with the Premier; and that the despatches submitted for her approval must therefore pass through the hands of Lord John Russell, who, if he should think they required material change, should accompany them with a statement of his reasons. In a letter addressed by the Prince Consort to Lord John Russell, on the 2nd of April, 1850, the writer notices that the result of Lord Palmerston's management of foreign affairs had been, that 'at a moment and in a 'conjuncture in which England ought to stand highest

'in the esteem of the world, and to possess the confi-
'dence of all Powers, she was generally detested, mis-
'trusted, and treated with indignity by even the
'smallest Powers.' The writer goes on to add: 'As a
'Minister, the Sovereign has a right to demand from
'Lord Palmerston that she be made thoroughly ac-
'quainted with the whole object and tendency of the
'policy, to which her consent is required; and having
'given that consent, that the policy be not arbitrarily
'altered from the original line, that important steps
'be not concealed from her, nor her name used with-
'out her sanction. In all these respects Lord Palmerston
'has failed towards her; and not from oversight or
'negligence, but upon principle, and with astonishing
'pertinacity, against every effort of the Queen. Be-
'sides which, Lord Palmerston does not scruple to let
'it appear in public as if the Sovereign's negligence in
'attending to the papers sent to her caused delays and
'complications.' The final result of the Queen's and the Prince's discontent with the conduct of Lord Palmerston was the communication of the following memorandum from the Queen:—

'Osborne, 12th August, 1850.

'With reference to the conversation about Lord
'Palmerston which the Queen had with Lord John
'Russell the other day, and Lord Palmerston's dis-
'avowal that he ever intended any disrespect to her
'by the various neglects of which she has had so long
'and so often to complain, she thinks it right, in order
'to prevent any mistake for the future, to explain what
'it is she expects from the Foreign Secretary. She
'requires:—1. That he will distinctly state what he

'proposes in a given case, in order that the Queen may 'know as distinctly to what she has given her Royal 'sanction. 2. Having once given her sanction to a 'measure, that it be not arbitrarily altered or modified 'by the Minister. Such an act she must consider as 'failure in sincerity towards the Crown, and justly to 'be visited by the exercise of her constitutional right 'of dismissing that Minister. She expects to be kept 'informed of what passes between him and the foreign 'Ministers, before important decisions are taken, based 'upon that intercourse; to receive the foreign des- 'patches in good time, and to have the drafts for her 'approval sent to her in sufficient time to make herself 'acquainted with their contents before they must be 'sent off. The Queen thinks it best, that Lord John 'Russell should show this letter to Lord Palmerston.'[1]

When, in the December of 1851, the circumstances of Lord Palmerston's conversation with Count Walewski in reference to the *coup d'état* occurred, as already detailed, the Queen wrote the following note to Lord John Russell, which no doubt was the real stimulus which impelled Lord John Russell to insist on Lord Palmerston's resignation of office :—

'Osborne, 13th December, 1851.

'The Queen sends the inclosed despatch from Lord 'Normanby to Lord John Russell, from which it ap- 'pears that the French Government *pretend* to have 'received the entire approval of the late *coup d'état* by 'the British Government as conveyed by Lord Palmers- 'ton to Count Walewski. The Queen cannot believe in

[1] *Life of the Prince Consort*, vol. ii. p. 305.

'the truth of the assertion, as such an approval given by 'Lord Palmerston would have been *in complete contra-* 'diction to the line of strict neutrality and passiveness 'which the Queen had expressed her desire to see followed 'with regard to the late convulsions at Paris, and which 'was approved by the Cabinet, as stated in Lord John 'Russell's letter of the 6th instant. Does Lord John 'know anything about the alleged approval, which, if 'true, would again expose the honesty and dignity 'of the Queen's Government in the eyes of the world?'[1]

On the 3rd of February, 1852, Lord John Russell, in the course of accounting for Lord Palmerston's resignation, read to the House of Commons for the first time the Queen's Memorandum of August, 1850. In case it might be supposed that Lord Palmerston, by not sending in his resignation at the time of receiving the Memorandum, acquiesced in the censure it implied, and approved the constitutional usage on which it implicitly purported to rest, it is necessary to give his own account of the transaction, as appearing from a letter of his to Lord Lansdowne, written in October, 1852, with reference to a conversation with the Duke of Bedford, published in Mr. Evelyn Ashley's Life:—

'I said to the Duke that I thought it was very 'unhandsome by me, and very wrong by the Queen, 'for him, John Russell, to have read in the House of 'Commons the Queen's angry Memorandum of August '1850, hinting at dismissal. In regard to the Queen, he 'was thus dragging her into the discussion, and making 'her a party to a question which constitutionally ought 'to be, and before Parliament could only be, a question

[1] *Life of the Prince Consort*, vol. ii. p. 412. (The italics are as printed in the Life.)

'between me and the responsible adviser of the Crown;
'and I said that this mention of the Queen as a party
'to the transaction had given rise to newspaper remarks
'much to be regretted, and which the Prime Minister
'ought not to have given an occasion for. I said that, as
'regards myself, the impression created by his reading
'that Memorandum was, that I had submitted to an
'affront which I ought not to have borne; and several
'of my friends told me, after the discussion, that they
'wondered I had not sent in my resignation on receiving
'that paper from the Queen through John Russell. My
'answer to those friends, I said, had been that the
'paper was written in anger by a lady as well as by a
'Sovereign, and that the difference between a lady and
'a man could not be forgotten even in the case of the
'occupant of a throne; but I said that, in the first
'place, I had no reason to suppose that this Memoran-
'dum would ever be seen by, or be known to anybody
'but the Queen, John Russell, and myself; that,
'secondly, my position at that moment, namely, in
'August 1850, was peculiar. I had lately been the
'object of violent political attack, and had gained a
'great and signal victory in the House of Commons
'and in public opinion: to have resigned then would
'have been to have given the fruits of victory to
'adversaries whom I had defeated, and to have
'abandoned my political supporters at the very
'moment when by their means I had triumphed.
'But, beyond all that, I had represented to my
'friends, by pursuing the course which they thought I
'ought to have followed, I should have been bring-
'ing for decision at the bar of public opinion a
'personal quarrel between myself and my Sovereign—

'a step which no subject ought to take, if he can 'possibly avoid it; for the result of such a course must 'be either fatal to him or injurious to the country. If 'he should prove to be in the wrong, he would be ir-'retrievably condemned; if the Sovereign should be 'proved to be in the wrong, the Monarchy would 'suffer.'[1]

In commenting on these transactions, of course the questions are distinct as to whether the Sovereign has a right to have personally submitted to him, at any cost of delay and trouble, all the 28,000 despatches received —as stated by Lord Palmerston, and admitted by the Prince Consort—during such a year as 1848, with a view to the correction, amendment, and further reconsideration of the replies to them; and whether, assuming the demand to be a proper one, non-compliance with it is a ground for dismissal. There is, no doubt, a current underlying assumption in some quarters that the Sovereign is entitled to interfere more actively and personally in foreign affairs than in other administrative matters. The incessant attention to them, and the real acquaintance with them, manifested by the late Prince Consort, the family relationships by which so many of the European monarchs are bound together, and the diplomatic usages of centuries, as well as the chronic inattention of the general public in ordinary times to matters outside the country, are causes which, in the aggregate, have no doubt tended largely to expand the sphere of the English Sovereign's action in foreign policy, as contrasted with what is recognised as allowable in Home or Colonial affairs. But the recent public

[1] *Life of Lord Palmerston*, vol. i. p. 329.

concern which has been stirred even in complicated questions, affecting not only peace and war, but the equilibrium of the European Powers, seems to indicate that the age of private diplomacy and irresponsible correspondence conducted by Sovereigns or their agents is passing away. Constitutionally considered, there can be no reason whatever alleged in favour of a larger amount of interference on the part of the Sovereign with Ministers responsible to Parliament in foreign matters than in the case of home matters. The one and the other equally depend for their ulterior management, as well as for the supply of all moneys needed to enforce a policy, not only on the concurrence but on the active superintendence of both Houses of Parliament. So long as the initiative of each political step rests with the responsible Government, Parliament retains in its own hands the power of generally guiding the policy, controlling expense, enforcing publicity as may seem expedient from time to time, and suspending or terminating negotiations when it chooses. But when, behind the responsible Ministers, there is a subtle, undefined, and therefore unlimited influence, constantly playing on the deliberate counsels of those who are bound to give an intelligible explanation of every step taken to Parliament and to the country, and when this influence is not of the mere formal consultative sort, which can be at once evaluated and therefore discounted, but, by the necessity of the case, takes all the innumerable shapes of suggestions, detailed schemes, minute criticisms, incidental observations, and the scarcely concealed show of far-sighted political aims not coincident with the policy either of the Cabinet, or of Parliament, or of the country,—or at least in many points

divergent from that policy,—there is a factor introduced for which no theory of the English Constitution in its present form can possibly find a place. It is, indeed, a factor which, so far as it operates, must to that extent be the very negation of the Constitution, and steadily tend to its destruction.

It has already been seen that on more than one occasion, especially during the Crimean war, the Prince Consort, who, on the most favourable hypothesis, must be looked upon as representing the Queen, exceeded even the bounds of advice, suggestion, or criticism, when corresponding with the Ministers of the Crown; and, by endeavouring to exert a direct influence on the Ministers in relation to Parliament, hampered their independence and confused their sense of Parliamentary responsibility. The following letter, addressed by the Queen herself to the Prime Minister, Lord Aberdeen, when, at a critical moment of the Crimean war, his Lordship had thought it his duty to mitigate in the House of Lords Lord Lyndhurst's denunciation of the Russian encroachments, is the strongest known instance which the present reign supplies of intrusion on the part of the Sovereign on a field of free action which the Constitution has done its utmost to hedge about and protect from every sort of solicitation which is not of an open and directly accountable kind:—

'The Queen is very glad to hear that Lord Aberdeen 'will take an opportunity to-day of dispelling misap- 'prehensions which have arisen in the public mind in 'consequence of his last speech in the House of Lords, 'and the effect of which has given the Queen very 'great uneasiness. She knows Lord Aberdeen so well, 'that she can fully enter into his feelings, and under-

'stand what he means; but the public, particularly 'under strong excitement of patriotic feeling, is im- 'patient and annoyed to hear at this moment the First 'Minister of the Crown enter into an impartial exami- 'nation of the Emperor of Russia's character and 'conduct. The qualities in Lord Aberdeen's character 'which the Queen values most highly, his candour and 'his courage in expressing his opinions, even if opposed 'to general feelings at the moment, are in this instance 'dangerous to him, and the Queen hopes that in the 'vindication of his own conduct to-day, which ought to 'be triumphant, as it wants in fact no vindication, he 'will not undertake the ungrateful and injurious task 'of vindicating the Emperor of Russia from any of 'the exaggerated charges brought against him and his 'policy, at a time when there is enough in that policy 'to make us fight with all our might against it.' [1]

Of course it is well known that attempts have been made of late in some quarters to give a theoretical justification to these confessedly novel relations between the Sovereign and the Ministers of the Crown. A lengthy exposition of the true attitude which ought to be maintained by the English Sovereign is contained in some of the writings of the late Baron Stockmar, re-published in Mr. Theodore Martin's 'Life of the 'Prince Consort.' This Life is published 'with the 'sanction' of the Queen; and Mr. Martin, in characterising the most outspoken discourse on the subject, part of which forms the second of the subjoined extracts, speaks of it as 'a vigorous constitutional essay' and as 'a remarkable letter, in which the deepest student of

[1] *Life of the Prince Consort*, vol. iii. p. 77.

'our political history will find much to learn and profit 'by.' In spite, however, of the sympathetic attention paid to all the utterances of the Baron by the Prince Consort and by Mr. Theodore Martin, it is not necessary to impute to the Royal personages directly concerned either an unqualified approval of any of the doctrines asserted, or even any want of perception of the ignorance of English constitutional history which the Baron's statements disclose. It is sufficient to note that the doctrines in question have as it were been floating in the air at Court for several years; that no distinct repudiation of any one of them is contained in the numerous published replies and letters of the Prince Consort; and that some conspicuous acts, both of the Prince Consort and of the Queen, are, to say the least of them, not inconsistent with the supposition that Baron Stockmar's views were looked upon with favour. Recent utterances in the Houses of Parliament on the part of fulsome panegyrists of the Court, or idealistic adulators of the English Monarchy as likely to become ultimately the sole saviour of society, are entirely in harmony with Baron Stockmar's conceptions, and give weight to the suspicion that an organised attempt has been, or is being, made to take advantage of a lull of party controversy and political enthusiasm to supersede the well-established notion of purely Parliamentary Government by an ill-defined and long-discarded notion of Government by Parliament with the assiduous aid of the Royal Prerogative, or by an irresponsible exercise of the Royal Prerogative alone. The particular passages in Baron Stockmar's letters above alluded to are as follows:—

'Dec. 27, 1841.

'Since the theory of the Constitution has been 'brought more into harmony with the spirit and the 'wants of the age, its practical working has retrograded 'just as much as its theory has advanced. Whigs and 'Tories saw that from the moment the democratic 'element became so powerful there was only one thing 'which could keep this element within safe bounds, and 'prevent it from swallowing up first the aristocracy, 'and then itself. This one thing was the upholding 'and strengthening of the autonomy of the Monarchi-'cal element, which the fundamental idea of the Eng-'lish Constitution had from the first conceded to Royalty, 'and indeed concedes in theory up to the present hour. 'But, unfortunately, Peel has done nothing towards 'this upholding and strengthening; the most that can 'be said of him is, that he has not helped to make 'Royalty weaker than it was when handed over to him 'by Melbourne. In reference to the Crown the secret 'is simply this. Since 1830 the executive power has 'been entirely in the hands of the Ministry, and these 'being more the servants of Parliament—particularly 'of the House of Commons—than of the Crown, it is 'practically in the hands of that House. This is a 'distortion of the fundamental idea of the English 'Constitution, which could not fail to grow by degrees 'out of the incapacity of her Sovereigns rightly to 'understand and to deal with their position, and out of 'the encroachments on their privileges by the House 'of Commons. This perversion of the fundamental 'idea of the English Constitution is fraught with this 'great mischief for the State, that the head of the 'Ministry for a time can only be the head of a party, and

'consequently must only too often succumb to the 'temptation of advancing the imagined interests of his 'party to the prejudice of the public weal. To coun- 'teract on the part of the Crown this injurious tendency 'must at the present moment be a difficult task, inas- 'much as Ministers and Parliament will construe the 'legal powers of the Crown in accordance, not with 'the original spirit of the Constitution, but with the 'practice which has prevailed since 1830. Still, the 'right of the Crown to assert itself as permanent head of 'the Council over the temporary leader of the Ministry, 'and to act as such, is not likely to be gainsaid even by 'those who regard it through the spectacles of party.'[1]

'Jan. 22, 1854.

'Even in England all that is generally known is 'the position of the Throne towards the Legislature. 'Its position in Government proper,—in the Cabinet 'towards the responsible Ministers, has (especially since '1830) fallen more and more into an obscurity, which 'leads to misconceptions, and from them to absurd 'mischievous assertions, which are incompatible with 'the subsistence of Constitutional Monarchy. As the 'rights of the Crown in England are assured more by 'the traditions of ancestry and usage than by written 'laws, their continuance in their integrity is continu- 'ally menaced, and Constitutional Monarchy has since '1830 been constantly in danger of becoming a pure 'Ministerial Government. In theory one of the first 'duties of Ministers is to protect and preserve intact 'the traditional usages of Royal prerogative. . . .

[1] *Life of the Prince Consort*, vol. i. p. 314.

'Our Whigs, again, are nothing but partly conscious, 'partly unconscious Republicans, who stand in the same 'relation to the Throne as the wolf does to the lamb. 'And these Whigs must have a natural inclination to 'push to extremity the constitutional fiction—which, 'although undoubtedly of old standing, is fraught with 'danger—that it is unconstitutional to introduce and 'make use of the name and person of the irresponsible 'Sovereign in the public debates on matters bearing 'on the Constitution. But if the English Crown permit 'a Whig Ministry to follow this rule in practice, without 'exception, you must not wonder if in a little time 'you find the majority of the people impressed with 'the belief, that the King, in the view of the law, is 'nothing but a mandarin figure, which has to nod its 'head in assent, or shake it in denial, as his Minister 'pleases. Now, in our time, since Reform, the extinc- 'tion of the genuine Tories, and the growth of those 'politicians of the Aberdeen school, who treat the ex- 'isting Constitution merely as a bridge to a Republic, 'it is of extreme importance, that this fiction should 'be countenanced only provisionally, and that no oppor- 'tunity should be let slip of vindicating the legitimate 'position of the Crown. And this is not hard to do, 'and can never embarrass a Minister, where such 'straightforward loyal personages as the Queen and the 'Prince are concerned. For the most jealous and dis- 'trustful Liberalism, in any discussion about the definite 'interpretation of the law of Royal prerogative, must 'be satisfied, if this be placed no higher than a right 'on the part of the King to be the permanent Pre- 'sident of his Ministerial Council. . . . Ministerial responsibility in these days, for such Ministers as are

'incapable, and at any rate for such as are unscrupulous, 'is a mere bugbear. The responsible Minister may do 'the most stupid and mischievous things. If they are 'not found out, he may even continue to be popular; 'if they do come to light, it only costs him his place. 'He resigns or is removed,—that is all,—the whole 'punishment, the whole restitution made for the mis-'chief done to the common weal. But who could have 'averted, whose duty was it to avert, the danger, either 'wholly or in part? Assuredly he, and he alone, who, 'being free from party passion, has listened to the voice 'of an independent judgment. To exercise this judg-'ment is, both in a moral and constitutional point of 'view, a matter of right, nay, a positive duty. The 'Sovereign may even take a part in the initiation and 'the maturing of the Government measures; for it 'would be unreasonable to expect that a King, himself 'as able, as accomplished, as patriotic as the best of 'his Ministers, should be prevented from making use 'of these qualities at the deliberations of his Council. 'In practice, of course, the use so made will be as 'various as the gifts and personal character of the 'occupants of the throne are various; and these are 'decided not merely by the different degrees of capa-'bility, but also by their varieties of temperament and 'disposition. Although the right has, since the time 'of William III., been frequently perverted and exer-'cised in the most pernicious way, since 1830, on the 'other hand, it has scarcely been exercised at all, which 'is fundamentally less injurious to the State than in the 'other case. At the same time it is obvious, that its 'judicious exercise, which certainly requires a master 'mind, would not only be the best guarantee for Con-

'stitutional Monarchy, but would raise it to a height 'of power, stability, and symmetry, which has never 'been attained. At the same time, in the face of the 'exercise of this merely moral right of the Crown, the 'responsible Ministers may, so far as the substantial 'import, the excellence, and fitness of their measures 'are concerned, act with entire freedom and indepen- 'dence. The relation between Sovereign and Ministers 'becomes quite different, whenever the former has to 'decide as to the carrying out of a measure which he 'has already sanctioned; for then he is primarily 'charged with a constitutional control of the honesty 'and loyalty of his Ministers, which is exercised most 'safely for the rest of them through the Premier. 'Thus, then, do I vindicate for the Sovereign the 'position of a permanent Premier, who takes rank 'above the temporary head of the Cabinet, and in 'matters of discipline exercises supreme authority; and 'in this way I bring into harmony with the Constitu- 'tion a well-known saying of Palmerston's in his reply 'to Lord John in the debate on his dismissal, "I con- '"cede to the Minister not only the power to dismiss '"every member of the Cabinet, but also the right '"to dismiss them without any explanation of his '"reasons."'[1]

It would be a superfluous task to criticise word for word the language of these letters, or to compare closely the doctrine enunciated in them with the theory of the English Constitution as presented by all the best known and most authoritative expounders of it. The whole question between Baron Stockmar's views and the views

[1] *Life of the Prince Consort*, vol. ii. pp. 545–550.

which have hitherto been familiar is, whether, for purposes of administration and of initiating and guiding legislation, there is or is not some authority outside the body of the responsible Ministers of the Crown which is legitimately entitled to control the action of those Ministers, and yet which itself is subject to no responsibility of any kind. The undoubted course of the development of the English Constitution, from the epoch of its true modern foundation at the Revolution, has been towards extending the responsibility of Ministers and annulling all responsibility in the Sovereign. It was not before the House of Hanover was firmly established on the throne, not only by law, but by public sentiment and traditional usage, that it can be said that the Sovereign was really liberated from all recognisable responsibility to Parliament and the country. The Declaration of Rights and the Act of Settlement—as interpreted by all the circumstances of the Civil Wars and the Revolution, and by the other documents (such as the Petition of Right) which grew out of and were the expression of some of the most signal of those circumstances,—were ever before the eyes of the people as constituting the written terms of a formal contract between the Sovereign on the one hand, and the Houses of Parliament, as representing the country, on the other. The existence of this idea of contract or engagement does not depend for its validity on the casual value and prevalence of abstract theories on the origin of society, or on what is known as the 'Social Contract.' It was merely felt, universally and strongly, that if the country had definite duties towards the Monarch, the Monarch equally had definite duties towards the country. One conveniently arranged and systematised

list of these duties on the part of the Monarch was contained in the celebrated documents to which first the Revolution, and then the fresh settlement of the Succession, gave rise. But the gradual establishment on the throne of the Hanoverian family, and its solidification, for the purposes of popular sentiment, in the person of George III., have in fact silently altered the conditions of the Sovereign's tenure. Though it is still disputed in some learned quarters whether the adoption by the Sovereign of the Roman Catholic faith, or of some other creed not conformable to the standards of the Church of England, would *ipso facto* involve a forfeiture of the Crown, there is in truth no opening left by which the Sovereign could, apart from the co-operation of responsible Ministers, so infringe any written or unwritten article of the Constitution as to weaken his legal position. This change has been only rendered compatible with the progress of public freedom by substituting at every point a wholly unprecedented amount of several and joint responsibility in the advisers of the Crown, for all responsibility of the Sovereign. The place in which such errors as those of Baron Stockmar lurk is where it is supposed, either that this process of substitution is not yet complete, or that, if in appearance complete, it is not a real substitution at all, but merely a confusion of responsibility between the Sovereign and his advisers. The only remaining hypothesis—namely, that there is some authority which for some purposes is wholly irresponsible, and therefore may become as tyrannical or capricious as the accidents of personal character may determine,—is obviously an impossible one, inasmuch as the truth of it would drive the English Constitution some five centuries backward.

The real difficulty which appertains to the question, and which probably was the one unconsciously felt by Baron Stockmar, was how to find for a really intelligent, well-educated, and patriotic Sovereign any place at all commensurable with his personal dignity and the due use of his faculties in such a Constitution as that which the British Constitution has become, where all responsibility, and therefore all freedom of political action, is shifted from the Sovereign to the Ministers of the Crown. There is no doubt that the functions of government are more limited in the case of the occupant of the Throne than in the case of any other English citizen. But this is no reason why, in order to provide a field of activity for an energetic Sovereign, the Constitution should be invaded, any more than why an impulsive soldier or minister of religion should overstep the limits of his proper professional activity, and intrude into work which can only be effectively discharged by others. It has, however, often been pointed out that, even for a Sovereign who would preserve the freedom of the Ministers of the Crown unimpaired by any sort of interference, however subtle or courteous, and who would sternly abstain from all independent action outside the region marked out by the Constitution, there still remains enough to be done to afford almost infinite ground for public gratitude or public censure. The mere capacity of appreciating the distinctions of party, and in critical moments facilitating the solutions which alone can terminate, in a way beneficial to the country, party conflicts, without being immeshed in the tangles of party alliances, or, on the other hand, entertaining a cynical indifference to the contests of the national and Parliamentary life, is a rare gift to inherit by nature,

and is a hard attainment to acquire by culture. The possession, however, of such a capacity, and of the faculty of social discernment which shall enable him who above all others must not only lead society, but largely prescribe the current standard of morality and even of public taste, unerringly to distribute rewards and distinctions of that class for which Parliamentary responsibility is wholly insufficient as a mode of check or control, is surely one of the richest boons which can fall to the share of any human being, and one for the use of which no situation but that of a Throne can find adequate room. Brilliantly attractive as must still remain the arena of active government, it does not, in truth, yield to, or even compete with, the opportunity of public service and benevolent well-doing still preserved to the Sovereign by the occupations of which no political constitution can deprive him.

4. When once the principle of the responsibility of the Ministers of the Crown to Parliament has been firmly established, there is scarcely any opening left for the irresponsible action of the Sovereign in entire independence of the help or agency of persons who may be made accountable to Parliament. In fact, the opportunities of free action left to the Sovereign are limited to oral speech and written correspondence. It has scarcely been attempted as yet to put any shackles on the private conversation or the public utterances of Royalty; but the region of correspondence covers a large part of diplomacy, and, in view of the ignorance prevailing in one country of the constitutional forms and restrictions existing in another, as well as of the peculiar family, or at the least personal, relationships which

are held to bind together the persons and dynasties occupying the several European thrones, there is a real ground of fear either that the conduct of correspondence between this Government and foreign Governments should be at times entirely taken out of the hands of responsible Ministers, or that the correspondence of those Ministers should be conducted with all the dis advantages of the co-existence of a secondary and simultaneous correspondence, which may be out of harmony with the former. It has already been seen that on a memorable occasion the Prince Consort took upon himself to warn the Emperor of the French as to the consequences of making too cordial overtures of friendship towards the Grand Duke Constantine, who was expected on a visit to Paris. In this case, the formality was gone through of submitting the communication to the responsible Ministers before it was despatched; but it was noted that this scrupulous precaution did not rob the act of its character of initiating and formulating a policy in such a way as indirectly to influence Ministers far more powerfully than was probably intended. In the late Russo-Turkish war there were, similarly, constant reports floating about as to autograph letters passing between the Queen and, now the Emperor of Russia, now the Sultan of Turkey. No doubt all these reports were false; but the possibility of their existence points to a real constitutional danger against which it scarcely seems possible to provide any formal and legal security. Should the danger ever become a real and pressing one, the remedy must be sought in a more stringent insistence on the part of Parliament on publicity in the conduct of foreign policy, and in the growth

among foreign nations of an intelligent understanding of the real constitutional impotency of the English Sovereign.

Attention has been called of late to another field, in which the personal activity of the Sovereign may possibly expatiate independently of the advice or concert of responsible advisers. During the wars of 1878–1879 in Afghanistan and Zululand, rumours prevailed that the Queen had been personally and directly communicating with the Viceroy of India, with Lord Chelmsford, commanding the forces in Natal, and with the family of Sir Bartle Frere, the High Commissioner of Natal. The policy of the Viceroy and of the High Commissioner was at the time matter of public discussion, and it was alleged or insinuated that the correspondence of the Queen in each case either had a direct political bearing, or at least conveyed some expression of opinion in reference to acts that had been done, which went beyond the limits either of mere general interest in the progress of events, or of sympathy for disasters which had been incurred. Though for a long time the Government refused to condescend to explain what had really taken place, yet at length the facts all came out, and the explanation of them afforded by the Government, and generally well received on all sides of the House, has a permanent interest in view of the probable recurrence at similar crises of like rumours and apprehensions. In a debate which took place in the House of Commons on May 13, 1879, in which the whole question of the recent use of the Royal prerogative was brought under discussion, the Chancellor of the Exchequer, Sir Stafford Northcote, explained that 'at a 'moment of great anxiety, when Her Majesty's troops

'had met with a great disaster, when there was great 'loss of life and great anxiety, the Government were so 'far from expressing their censure or their want of 'confidence in our representatives in South Africa, that 'they felt it to be their duty to defend them in the re-'sponsible positions which they filled. Her Majesty, 'who is always ready with a kind word, sent a message 'in general terms of sympathy, and an expression of 'confidence that her troops would redeem their credit 'and save themselves from the difficulties in which they 'were placed, and that her Administrator and Governor 'would be able to bring them out of their embarrass-'ments.' 'I do not think,' added the Chancellor of the Exchequer, 'that any one can make a serious charge out 'of that.' Towards the close of the debate, Mr. Cross, the Home Secretary, further said: 'It is only right to the 'House and to the country that I should state at once 'what I have the Queen's authority to state, and I re-'ceived only to-day, that in the communication Her 'Majesty made to Lady Frere she did express, as she 'was bound to do, her deepest sympathy with the diffi-'culties and dangers with which Sir Bartle Frere had 'had to contend; but her communication was couched 'in the most general terms, and there was nothing in 'it to lead him to suppose that Her Majesty wished to 'recommend any line of policy to be taken.'

With respect to the report of the Queen's private communication with the Viceroy,—which Sir Stafford Northcote admitted, both by distinct allegation, and by the scrupulous care with which he examined and recounted all the circumstances appertaining to it, to be matter of relevant constitutional inquiry,—it is satisfactory to narrate both the dream and the interpretation

of it in Sir Stafford Northcote's own language in the course of the same debate :—

'With regard to the case of the Indian telegram, I 'am bound to say that it is a matter requiring a 'moment's consideration. The charge against the 'Government is made in a very remarkable article con- 'tributed to one of the numerous periodicals of the day 'by a gentleman whose name is very well known to us 'all as a special correspondent and an admirable writer, 'Mr. A. Forbes, whose descriptions we all read with 'interest and pleasure. Whether he is an equally great 'constitutional authority is, of course, another question. 'His article is entitled "Some Plain Words about the '"Afghan Question," and gives an account of the origin 'of the war. He states that Lord Lytton was desirous 'of bringing about a quarrel with the Ameer, and that 'he was unnecessarily pressing upon the Home Govern- 'ment, who were themselves unwilling to take the step, 'the necessity of hostilities with Afghanistan. Mr. 'Forbes proceeds to say, "While working in this fashion '"on his own account, Lord Lytton was pleading with '"Lord Cranbrook for his sanction for an immediate '"declaration of war," and, after a few more sentences, 'he adds that while applying unsuccessfully through the 'official and constitutional channel, "it is not generally '"known, but it is true, that the Viceroy has been in '"direct communication with Her Majesty. How copi- '"ous his message was may be judged from the fact that '"a single telegram was so long that the cost was 1,100 '"rupees." These words are placed in italics, and a 'great writer does not usually place his words in italics 'unless he wishes to direct particular attention to that 'of which he is writing. It is obvious that the mean-

'ing of the paragraph is this—that Lord Lytton, desir-
'ing to bring about the acceptance of a certain policy,
'and finding himself unable to persuade the Ministry
'by argument, addressed himself directly to the Queen
'that he might obtain Her Majesty's support in order
'to carry his object. If that charge is true, it is a
'most serious one, and an offence trenching upon the
'privilege of Parliament and the Constitution of the
'country; but there is no foundation whatever for it.
'It is perfectly true that a long telegram was sent to
'Her Majesty; but what was the date of that message,
'and what were the circumstances in which it was sent?
'I have been favoured with a sight of that telegram,
'and am perfectly acquainted with it. I will describe
'its nature and purport. It is dated November 26, and
'the war had begun five days previously, on November
'21. It is a telegram describing in tolerably succinct
'phrases the advance of the various columns of the
'forces. It mentions the advance at all points, on the
'morning of the 21st, of the three Generals, and specifies
'for the information of Her Majesty the nature of the
'operations intended. There is not one word upon the
'causes of the war, nor any mention of political matters
'in the whole telegram. It is merely a despatch for-
'warded at the moment when the movements were
'occurring, in order that Her Majesty might receive
'early and authentic intelligence of what was happen-
'ing. That is the whole state of the case with reference
'to that mysterious telegram; and in reply, Her Majesty
'simply expressed her gratification at the conduct and
'success of the troops. This telegram was not sent by
'Her Majesty without being first communicated to and
'approved by Her Majesty's Ministers. I really wish to

'ask the House what they consider to be the position 'and the rights and duties of the Sovereign. Are they 'of opinion that it is improper that Her Majesty should 'be in any way in the receipt of intelligence as to inter- 'esting and important events that are going on? Are 'they of opinion that she is never to write a private 'letter or express an opinion of her own upon any matter 'which seems to call for an expression of her sympathy 'with those who are in trouble? Is it possible to sup- 'pose that one who has held and who holds so important 'a position as the Queen of England, one who has had 'all her experience, one whose right it is, as the hon. 'member for Liskeard has said, "to be consulted, to en- '"courage, and to warn," is to be deprived of all means 'of information as to the real state of affairs in this 'country or anywhere else? I maintain that that 'position is utterly untenable. We have seen in some 'of the language used to-night to what absurd and 'ridiculous lengths such pretensions may be pushed. 'It appears that Her Majesty may not even be informed 'as to the details of what occurs in this House or of 'what happens within her own Cabinet. I really wonder 'at the views which hon. gentlemen have expressed. I 'think I may say, in answer to all these charges, that 'the character and the history of the present reign and 'the present Sovereign are in themselves a sufficient 'refutation of them.'

Lord Hartington, the recognised leader of the party in opposition, referring to the Chancellor of the Exchequer's explanation of the facts of this correspondence with the Indian Government, said that 'it would have 'prevented a great deal of misapprehension if we had 'had in the first instance the explanation which has

'been given to-night.' He added, with respect to 'the 'alleged correspondence with Sir Bartle Frere,' 'I cannot 'say that, as the facts are before us, there is anything in 'them to give rise to any constitutional jealousy on the 'part of this House.'

Section III.—The Ministers of the Crown and Parliament.

It is not to be wondered at that no constitutional topic has attracted more attention of late years than that of the true relation between the Ministers of the Crown and Parliament. In the first place, this relation is by its nature of the most subtle kind, and sets at defiance any attempt at legal definition. In the second place, no analogy or precedent for the character of the relation, as it exists in England at the present day, is supplied by the experience of any other country. In other countries the Ministers of the Crown occupy a position either entirely outside the representative Assemblies, as in the United States; or in only casual and desultory connection with them, as under even such free Constitutions as those of France and Italy; or one which is practically adverse to the representative Assemblies, in reference to which the Ministers merely personate the competing and conspicuously jealous attitude of the Crown,—a state of things which seems to be represented in the German Empire. In the third place, the relation as it exists in England at the present moment has been in fact only recently and rapidly developed. It is still, in fact, in process of formation, and may yet have to undergo many a fresh metamorphosis.[1]

[1] It is at present rather a matter of customary constitutional practice than of strict legal necessity that the Ministers of the Crown, or even the Members of the Cabinet, should have seats in either House of Parliament. It still sometimes accidentally happens that, owing either to the necessity of a Minister of the Crown vacating his seat (under the Statute of Anne) when appointed to his office, or to the temporary misadventures of a general election, a Minister of the Crown is sometimes without a seat in either House

The leading characteristic of the relationship between Ministers and Parliament in England is, that the connection between the personality of the Ministers and the two Houses of Parliament is partly assumed to be, and partly is of necessity, as intimate, as capable of fine adjustments to mutual and changing susceptibilities on both sides, and as flexible, not to say transitory, as constitutional machinery could make it. It is not, of course, true that a relationship of this sort is ever attained, even for a time. The competition of parties in the Houses, the play of individual divergence or eccentricity, the intrinsic difficulty of securing permanent co-operation either within the Ministry, or among its supporters, or among its organised opponents, all tend to render the position of a Ministry towards Parliament in any given time far more flickering and uncertain than the above theory assumes. But there is no doubt that in England,—and that increasingly,—confidence and not distrust, unity and not division of action, cohesion and concentration in performance, even where

even when Parliament is sitting. Sir Hardinge Giffard, Solicitor General in Lord Beaconsfield's Government, was for some months in office before he succeeded in getting a seat. It is curious that there does exist a statutory limitation in the other direction, which, by a strange anomaly, is thrust into the middle of the 'Act for the Better Government of India' of 1858, which Act contemplated the addition of a fifth principal Secretary of State. In view, apparently, of some jealousy of undue Government influence in the House of Commons which might thereby result, the fourth section of the Act enacts that 'after the commencement of this Act any four of Her 'Majesty's principal Secretaries for the time being, and any four 'of the Under Secretaries for the time being to Her Majesty's 'principal Secretaries of State, may sit and vote as members of the 'House of Commons, but not more than four such principal Secre-'taries and not more than four such Under Secretaries shall sit as 'members of the House of Commons at the same time.'

following upon long distraction of counsels, represent the ideal attitude of Parliament and the Ministry when concerting together either for legislative or administrative purposes. The Ministry of the day appears in Parliament, on the one hand as personating the Crown in the legitimate exercise of its recognised prerogatives, and on the other hand as the mere agent of Parliament itself, in the discharge of the executive and administrative functions of government cast upon them by law. In respect of this last-named capacity, it is obviously of the greatest advantage that Parliament should have close at hand the personal officials who are charged with carrying on its own work, So much is recognised even in those countries where the least amount of concerted action seems to prevail as between the executive and the legislative authorities. It is rather where the Ministry are charged with exercising in the name of the Sovereign those acts of prerogative which Parliament is incompetent itself to perform directly, that some jealousy, not to say antipathy, may be conceivably introduced in the conduct of relations otherwise essentially harmonious. In this region lie the stirring topics of foreign negotiations, the management of the Army and Navy, public finance, and, in some important respects, Colonial administration. Of course, with regard to such executive acts as the conferring of honours and dignities, nomination to appointments in Church and State, and even the grant of large classes of charters and privileges, it could not be expected that Parliament, with its unwieldy mass of divers elements and complicated modes of action, could beneficently interfere otherwise than by generally approving or disapproving the Ministry of the day, or perhaps formally censuring glaring outrages or

abuses. But the great topics enumerated above are of a different kind. They are all of them such as must of necessity, at some time or other, come under the direct supervision of Parliament. Most of the affairs they relate to cannot be consummated without the help of funds to be obtained from a Parliamentary grant. They are every one of them topics of the utmost relevancy to the national fortunes and reputation, and such as, the more public education and patriotism are extended, will excite an ever-increasing breadth and intensity of interest throughout the country. Thus, if the consideration of these topics must at some point or other be brought in all its fullness before Parliament, it is a reasonable matter of anxiety on the part of Parliament that its own functions be not unduly forestalled by premature action or anticipatory steps which may, further than is absolutely needed, pledge the conduct of Parliament in one direction or another, and so effectually tie its hands. In cases such as these, where a sort of co-operation is pre-supposed between the Crown on the one hand and Parliament on the other, and yet where the circumstances of every successive practical problem must so far vary as to preclude the use of unbending rules, Parliament has two classes of remedies, or preventives, to avail itself of, for the purpose of guarding its rights. 1. One class is to be found in the practice of cherishing to the utmost the relationship of confidence, unity of spirit and action, and hourly responsibility, in all its dealings with the Ministers, either as a corporate body or as severally administering great Departments of State. 2. The second class of remedies must be found in determining, with such precision as is at all applicable, the duties of Ministers with respect to the time,

manner, and fullness of communication with Parliament on all those matters for which its co-operation must be sooner or later demanded. It will be seen shortly that, apart from all difficulties in practice due to the unforeseen vicissitudes of events, a vast amount of indecision of principle prevails as to what are the duties of the Ministers of the Crown in furnishing communications to Parliament at the earliest stage, and in pledging or not pledging the future policy of Parliament.

1. The attainment of the end of confidential and harmonious relations between the Houses of Parliament and the Government of the day is greatly facilitated by the mode in which the Government is created, and the reciprocity and mutual dependence which spring from the competing powers which the Government has over the two Houses, and which the two Houses have over the Government.

The existing Government is seldom the product of some accidental combination of forces, such as in some colonial legislatures, where party organisation is not highly developed, and has only short traditional associations behind it, is often able unexpectedly to secure a transfer of executive power from one set of hands to another. In the English Parliament, and especially in the House of Commons, it is only at rare intervals that there are found more than two coherent parties of sufficient size, uniformity of general action, and what may be called corporate solidity, to compete with each other for entire supremacy in the House and in the country. It thus comes about that, if one of these parties contains and supports the Government of the day, the other party is thereby spontaneously moulded into the

character of what is known as an organised Opposition. There is of course something obviously artificial in this pitting of one large portion of an aggregate assembly against another large portion of it; and where special effort is not made to sustain the fiction, and, as it were, to rally the combatants in such a way as to bring about a regulated system of controversial warfare, the discrepancies of individual opinion, taste, and temper would render even the strongest party attachments brittle and untrustworthy. But, apart from the advantages of securing uniformity in legislation and continuity of purpose in all departments of government,—a want of which has, even from Grecian times, been felt to be the bane of democratic assemblies,—the advantage of indicating beforehand the only quarters from which an executive Government enjoying the confidence of a large proportion of the House can be supplied, and the quarters in which such a Government can be certainly looked for, is so great a one as of itself to give a permanent stimulus to the instincts of party spirit. A well-settled consciousness of all these advantages has led in this country, and especially of late, to the practice of organising the party in opposition with a punctiliousness and watchfulness equal to that bestowed on the maintenance of the unity and cohesion of the party in power. The Opposition party has now its recognised leader, who is the organ of communication, for all purposes of arrangement and simplification of public business, with the leader of the Government,—that is, the leader of the House. The Opposition recognises, equally with the party in power, the duty of loyalty to the clearly-ascertained will of its own majority, or to the dictates of its chief, as presumedly expressing that

will; and of faithfully submitting to all the compromises or adjustments of business which its own chief, in concert with the leader of the House, shall make from time to time, in furtherance of such ends as that of deciding satisfactorily complex issues between the rival parties, and of determining whether the party in power continues to possess, on some or on all topics, the confidence of the majority of the House. In spite of the fact that it is the duty and habit of the Opposition to do its utmost to expose the shortcomings of the Government, and in fact to be the organ of the House itself for the purpose of compelling the Government to acknowledge the rights and claims of the House,—and that thereby an irritating hostility, sometimes of a most acrimonious and embittered sort, is engendered,—the existence and nurture of the relations just adverted to between the Opposition and the party in power have the effect of producing an extraordinary amount of unity of spirit and general co-operation between the House itself and the Government. The Government seems to the House to be, and is, the direct product and continuing creature of its own highest and most intense organisation. Apart from all the direct and obvious checks which the House can exercise over the acts of the Government and of particular members of it, there is the subtlest of all preservatives for a general spirit of faithfulness towards the Government of the day in the dominant consciousness that the only choice is practically between that Government and another, the elements of which are well known and close at hand; that every Government is open to a large class of very similar defects; that for a large class of uncontroverted action the support of the House must be

given to the Government of the day; and that the House can at its will, with the utmost possible facility, secure the substitution of one Government for another.

The House, however, has many direct ways of ascertaining how far Government and the members of its several departments are conforming themselves to the will of the House, and maintaining themselves in sympathy with it. Such matters of inquiry are, in fact, not less interesting to the majority which habitually supports the Ministry than they are to the minority which opposes it. The practice of putting questions on notice given to the heads of Government departments has now become a considerable part of the business of the House of Commons. Indeed, it has been complained in some quarters that the privilege of questioning Ministers is often abused; that the form of the question too often contains either an argument, or an implied assertion of facts, of a kind which could not be then and there controverted; and that the quantity of questions proposed, often for apparently frivolous ends, is affording a serious interruption to the conduct of public business. The Speaker, however, has full powers to restrict or alter an improper question; and it is possible that the general sense of the House will lead to such a curtailment of the practice of questioning as general convenience may call for. Nevertheless, the right of questioning Ministers, and the duty of their replying fully and frankly in all cases where the urgent necessities of the public service do not impose reticence —an occasion the justness of which will be tested by Parliament at a later day—are corresponding privileges which Ministers themselves often appreciate as much as their questioners. An opportunity is thereby afforded

for a Minister to explain what is ambiguous in his conduct—to dissipate at the outset a popular rumour, or to prepare the way for carrying out an ulterior policy by indicating in the most informal fashion his present intentions. Thus, both question and answer afford a fresh link of political sympathy between the House and the Government.

It is the well-recognised practice at present for the Government of the day, in managing the business of the House, to afford every facility,—either by suspending its own business or by altering its arrangements,—for bringing on the discussion of any leading controverted topic which is in fact a trial of strength between the great parties in the House. The Government of the day has therefore partly forced upon it, and partly provided by its own voluntary efforts, occasions for testing the continuance of the confidence of the House,—or of either House; for it must be remembered that though, in ordinary cases, the opinion of the House of Commons is at present more decisive on the fate of a Ministry than that of the House of Lords, yet still there are circumstances—such as those supplied by an ambiguous or fluctuating vote of the House of Commons, or an unwonted outcome of Liberal sentiment emanating from an unusually large majority in the House of Lords, or by the fact that the Government of the day is more effectively represented in the House of Lords than in the House of Commons,—when a decisive judgment pronounced by the House of Lords in respect of confidence in the Ministry will be taken for the voice of Parliament and of the country. There are three modes in which the question of confidence in the Ministry is now usually raised. Either a motion is brought forward

containing in its terms, expressly or implicitly, a general expression of censure of one or more Governmental acts, for which the Cabinet as a whole assumes the responsibility,—and of course every exercise of the Royal prerogative belongs to this class of acts;—or a motion is brought forward expressing a mere general want of confidence, every speaker on the motion alleging what grounds he chooses for disapproval or approval of corporate or individual acts of all members of the Government; or, again, measures of the Government which the Government has deliberately selected as expressions of its policy, or for other reasons cared to base its existence upon, are rejected by Parliament, or only accepted with such qualifications as to render them worthless in the eyes of their originators. A similar result to this last is brought about when the House intimates its being out of harmony with the Government, not by rejecting any measure of great moment, but by impeding, amending, or finally discarding, a series of measures of trifling importance in themselves, but which the Government is bound to provide for, and a general resistance to which can only be dictated and sustained by political distrust of the particular persons who advocate them. This aggressive machinery has for many years past proved so effective for displacing Governments with which the House is no longer satisfied, or for bringing a straying Government back to the grooves of conformity from which it has wandered, or for effectually correcting isolated extravagances, that all reference to such a clumsy and uncertain weapon as that of impeachment is almost banished to the lore of historical treatises. The present methods are not only far more certain than the older one, but they operate

with the most flexible capacity for adjustment to the necessities of the hour, and are capable of any amount of remission, graduation, and extension. They also leave the Government in a far more free and dignified posture, relieved from any mere haunting terror of a coarse penal sanction. Nevertheless, the place of impeachment in the English Constitution must not be looked upon as vacated; because a possibility of resort to it still testifies to the fact that all agents of the Crown, whether in or out of Parliament, are liable to be subjected to the forms of a criminal trial in which one House of Parliament is the judge and the other House the prosecutor, and in which the criminal code in use is not limited in its language by the stereotyped expressions of the ordinary law, but is in fact created for the occasion by the joint opinion of the two Houses of Parliament on the political exigencies of the moment. The use of this terrible and dangerous weapon is likely hereafter to be reserved for crises which, if they could be foreseen, would be otherwise provided for; and for alleged criminals who are not subject to such effective control at every point as the recognised Ministers of the Crown in Parliament; and especially in the case of offences,—such as those which originally created the class of misdemeanours—which the language of the ordinary law has not succeeded in reducing to distinct terms, and yet which are of a magnitude sufficient to prevent existing Courts of Justice from including them by the most bold use of analogy within any well-recognised class. The real obstacle, however, to the use of the instrument of impeachment is that it must be the result of a vote of the majority of the House of Commons, and therefore becomes inevitably, and to a degree wholly unsuitable

to the dignity of a criminal proceeding, entangled in the strife of opposing parties, or made to symbolise the triumph of one. All these objections, and others still more obvious, apply to what is now the practically obsolete method of proceeding by Bills of Attainder.

It need hardly be said, that no line can be drawn, in a theoretical disquisition, to mark the moment, as indicated by the number of votes, or the frequency of adverse votes, or the topics on which adverse votes are carried, at which a Government ought, by existing constitutional practice, to tender its resignation. In a doubtful case, the Government may have to consider the claims of three different orders of persons; first, the majority in the House which has outvoted it; secondly, its own political party, which continues to support it; and thirdly the Sovereign, who must be conceived to have an interest, not indeed in the prevalence of one party in the House over another, but in the continued exemption of the work of government from disturbance or from a needless change in the personality of its officials. There have been of late years some notable instances in which the Government of the day has, much to the surprise of its own party, taken a notably independent step, with the view either, as alleged by some of its defenders, of conforming to the sounder views of a majority in the House, or, as alleged by other of its defenders, of sparing the Sovereign the personal inconvenience incurred by a superfluous change in the officials through whom the business of the country was being conducted. The history of the repeal of the Corn Laws in 1846 supplies the most illustrative instance both of the problem before a Government in such a case, and of its various possible solutions. Sir Robert Peel,

indeed, was himself an honest convert to the views of the majority of the House in favour of the abolition of protective duties; but his representative in the House of Lords, the Duke of Wellington, seems to have made little secret of the fact that from his point of view the main matter for consideration was the convenience of the Sovereign. Whether it is really fair to impute to the Duke of Wellington this deliberate preference of the convenience of the Sovereign to the claims of party loyalty, and therewith a willingness to annihilate the functions of the House of Lords, may be doubted by those who do not put an unwavering trust in Lord Beaconsfield's political recollections and sentiments. But Mr. Disraeli, in his 'Life of Lord George Bentinck,' not only represents the Duke as faithless to his party and to his allegiance to the House of Lords, in deference to the claims of the Sovereign and of the House of Commons, but characterises such conduct as in the highest degree unconstitutional. The passages alluded to are as follows:—

'His Grace of Wellington seemed to be of opinion 'that neither fidelity to party, nor even a conviction of 'right, ought to be permitted to stand for a moment in 'his way when the assumed convenience of the Crown 'was concerned:—sentiments that have never been 'sanctioned by the present Sovereign of England, and 'which would appear to be more becoming in the mouth 'of some professional courtier than of one who had 'been the keen leader of a great Parliamentary party, 'and who by their co-operation and confidence had achieved the long-contrived object of his ambition, 'the premiership of England. . . . The principle laid 'down by His Grace may be an excellent principle, but it

'is not a principle of the English Constitution. To be 'prepared to serve a Sovereign without any reference 'to the policy to be pursued, or even in violation of the 'convictions of the servant, is not the duty of the sub-'ject of a Monarchy modified in its operation by the 'co-ordinate authority of Estates of the Realm. It is 'in direct violation of the Parliamentary Constitution 'of England, and is a principle which can only be prac-'tically carried into effect in the cabinets of absolute 'monarchs.'[1]

And again, on page 229:—

'After a discussion of three nights, closed by the 'Duke of Wellington in a speech in which he informed 'the House of Lords that "the Bill for the Repeal of '"the Corn Laws had already been agreed to by the '"other two branches of the Legislature," and that 'under these circumstances "there was an end of the '"functions of the House of Lords," and that they had 'only to comply with the projects sent up to them,—a 'sentiment the full bearing of which seems not easy to 'distinguish from the vote of the Long Parliament 'which openly abrogated those functions,—the Lords 'passed a second reading of the measure by the large 'majority of forty-seven.'

In a later passage of the same work (p. 390) Mr. Disraeli gives his views as to the duties of Sir Robert Peel himself, on the assumption, as was above noticed, that he himself personally acquiesced in the wisdom of the decision of the House of Commons.

'But this false position, which has strained and in-'jured our happy Parliamentary government, is not

[1] Mr. Disraeli's *Life of Lord George Bentinck*, pp. 61, 63.

'attributable to the Whigs, but rather to that states-
'man, who, with all his great qualities, seems never to
'have been conscious that the first duty of an English
'Minister is to be faithful to his party, and that good
'and honourable government in this country is not only
'consistent with that tie, but in reality mainly de-
'pendent upon its sacred observance.'[1]

These extracts are of course not inserted here in order to give any weight to doctrines which at the best are asserted in far too unqualified a form to render them of any constitutional import, and which Lord Beaconsfield himself would undoubtedly express in a very different and far more balanced form at this day, but because they put in a clear shape the real problems which lie before the head of a Government when the recognised policy of his party is persistently outvoted in the House of Commons, and when the difficulty is further increased by his own acquiescence in the justice of that vote. It is not the Sovereign, nor either House of Parliament, which alone can be taken as affording by its known wishes or prejudices a practical guide to a Minister in such an emergency. He must consider whether, on the whole, the country, as represented in Parliament,—or perhaps as capable of being represented by a newly-elected Parliament,—has or has not determined on a particular course of policy. If it is believed that the country has determined upon such a course, the next question is, whether the existing Government acquiesces so far in the wisdom of the policy as to continue to sustain its natural and confidential relations with Parliament in the course of carrying the policy

[1] *Life of Lord George Bentinck*, by Benjamin Disraeli, M.P., pp. 61, 68; 229; 390.

into practical effect. The Government may treat the policy either as advantageous, or as vicious, or as indifferent enough to be an insignificant item in their conduct. In the first and last of these cases the Government might, so far as Parliament is concerned, honestly retain their places. So far as their own party is concerned, in and out of Parliament, it may perhaps be said that they should afford that party an opportunity of choosing fresh and more exact representatives if they themselves have, through a change of opinion, swerved from the programme with which they came into office. In the second case, where the policy supported by Parliament is decisively repudiated by the Government, no justification can be admitted for their retaining office a single day. The uses and limits of the allegiance of a Government to its party are well expressed in the following passage from Lord Grey's 'Parliamentary Reform':—

'What particularly distinguishes our present system 'of government, and constitutes, as I have endeavoured 'to show, some of its main advantages, is the respon- 'sibility which it imposes, both on Parliament and on 'the Servants of the Crown. Every Member of the 'House of Commons feels, or ought to feel, that it is a 'serious step to give a vote which may compel the 'existing Government to retire, without a reasonable 'prospect that another better able to conduct the affairs 'of the country can be formed. The Ministers, on the 'other hand, know that they are not held to be absolved 'from responsibility for unwise measures, because they 'have been forced upon them by the House of Commons; 'but that if they continue to administer the affairs of 'the country when powers they think necessary have

'been refused, or a course they disapprove has, in spite 'of their advice, been adopted by the House, they are 'justly held answerable for the policy of which they 'consent to be the instruments. But if it should ever 'come to be regarded as not being wrong, that Ministers 'should retain office though they were no longer able 'to guide the proceedings of the House of Commons, 'there would cease to be in any quarter an effective 'responsibility for the prudence and judgment with 'which the affairs of the nation are conducted in Par-'liament. Ministers could not be held answerable for 'the conduct of a Parliament they had no power to 'direct, and the only responsibility left would be that 'of the House collectively. Experience, as I have 'already remarked, proves, that a responsibility shared 'amongst so many is really felt by none; and that a 'popular assembly, which will not submit to follow the 'guidance of some leader, is ever uncertain in its con-'duct and unstable in its decisions. After the Revolu-'tion of 1688, when the House of Commons had by 'that event acquired great power, and had not yet been 'brought under the discipline of our present system, 'these evils were grievously felt. They would be far 'more so in the present state of society, and we must 'expect to see the House of Commons arriving at many 'hasty and ill-judged decisions, and its members giving 'their votes much oftener than they now do contrary 'to their judgment in deference to public clamour, if 'they were relieved from the apprehension of creating 'the difficulties that arise from a change of Govern-'ment. Those who have watched the proceedings of 'Parliament cannot be ignorant how many unwise votes 'have been prevented by the dread of the resignation

'of Ministers, and that the most effective check on 'factious conduct on the part of the Opposition, is the 'fear entertained by its leaders of driving the Govern- 'ment to resign on a question upon which, if they 'should themselves succeed to power, they would find 'insuperable difficulties in acting differently from their 'predecessors.'[1]

In tracing the modes by which Parliament exercises its right of restriction and control of the acts of the Government, it is not necessary to do more than allude to the effective method which is always at hand and which is largely resorted to in Continental and Colonial Legislatures,—that of refusing or delaying the monetary supplies which are needed to carry out the general policy of the Government, or particular parts of that policy. The only reason why this somewhat rough method is at present little used in England is that all the other methods already enumerated are less coarse, more flexible, and abundantly effective. Nevertheless, the recognised right of control of expenditure possessed by the House of Commons is not only serviceable for the purpose of securing economy and publicity in the management of the public purse, but affords one of the most available openings for criticising minute details of ministerial management, and bringing the conduct of the Government, in the smallest matters as well as in the greatest, under the eye of the public, and into the most exact attainable harmony with the requirements of Parliament.

But the reciprocity of action between Parliament and the Government is maintained, not only by the

[1] *Parliamentary Government considered with reference to Reform.* By Earl Grey. P. 102.

dependence of the Ministry of the day on the will and favour of Parliament for its continued existence, but also by the fact that the House of Commons at all times, and the House of Lords, by possibility, in critical times, are themselves in a large measure dependent, in certain important respects, on the will of the Ministry. The right of the Ministry, through the exercise of an undoubted act of the Royal prerogative, to dissolve the House of Commons at any moment, on the hypothesis that, from a change of opinion either in the country or within the House, the House has ceased to represent the constituent body, affords the Government the opportunity of checking the development of a spirit of mere anarchy, insubordination, or reckless vacillation, to which large promiscuous bodies free from direct responsibility are at certain seasons prone. The lesser right of prorogation at any moment convenient to the policy of the Government, and the right of selecting the moment at which Parliament shall re-assemble, are also advantages in the hands of the Government which have the effect not only of largely increasing their moral influence in the House, but of enabling them to make the most economic physical use of all the political and material resources at their disposal. In the debate which took place on the Royal Titles Bill, at the opening of the year 1876, Lord Beaconsfield, then Mr. Disraeli, said: 'The prerogatives of the Crown are 'of great value and importance. The fact is, that 'Parliament exists by the prerogative of the Crown. 'It is the Royal Warrant which allows this House to be 'elected, and to assemble, and without it we could not 'meet in this place. We could not go to our con-'stituents without the writ of the Sovereign.' There

is a sufficient amount of formal truth in this statement to justify, or at any rate to excuse, its use in a rhetorical address; but, except for the purposes of such an address, or for the ornamentation of a work of political fiction, Lord Beaconsfield himself would hardly consider this passage an adequate or accurate description of the mutual dependence on each other of Parliament and the Crown. It may be true that the time (within certain legal limits), and even the place of meeting of Parliament, depend on the will of the Crown as represented by its responsible advisers, and as legally signified by technical writs and warrants. In no other sense is it true that Parliament exists by the prerogative of the Crown; and the testimony of history rather is, that the English Constitution has attained its most characteristic development in rendering every act of the Royal prerogative dependent for its validity on the acquiescence of Parliament. In fact, the Crown and Parliament can only be looked upon as two entirely independent factors in the Constitution. But they are so intimately connected in such countless ways that it is only too easy for a debater, in the hurry or frenzy of argument, to speak of the one as existing by the will of the other. Lord Beaconsfield himself, when, as Mr. Disraeli, he succeeded Lord Derby in the leadership of the Conservative Government in 1868, and his party proved to be in a minority in the House of Commons on the question of the Disestablishment of the Irish Church, and when he was understood to have intimated,[1]

[1] The true interpretation of what had passed between Mr. Disraeli and Her Majesty must be left to the reader of Mr. Disraeli's original statement in the House, his subsequent explanations, and the debate thereupon as they are given in *Hansard*. The original

much to the surprise of the House, that he had left to the Queen personally the question as to whether he should dissolve the House or not, had an opportunity of illustrating one theory at least of the place the Sovereign might be conceived to hold in reference to the House of Commons. The following language, used in the course of his speech in the House of Commons by

statement of Mr. Disraeli is reported by Hansard as follows:—'I 'told Her Majesty that under the circumstances the advice which 'Her Majesty's Ministers would, in the full spirit of the Constitu- 'tion, offer to Her Majesty, would be that Her Majesty should dis- 'solve this Parliament, and take the opinion of the country as to the 'conduct of her Ministers and the question of the Irish Church. 'But at the same time, with the full concurrence of my colleagues, 'I represented to Her Majesty that there were important occasions 'on which it was wise that the Sovereign should not be embar- 'rassed by personal claims, however constitutional, valid, or meri- 'torious, and that if Her Majesty were of opinion that the question 'at issue could be more satisfactorily settled, or the just interests 'of the country more studied, by the immediate retirement of the 'present Government from office, we were prepared to quit Her 'Majesty's service immediately. . . . In fact, sir, I tendered my 'resignation to the Queen. Her Majesty commanded me to attend 'her in audience on the next day, when Her Majesty was pleased to 'express her pleasure not to accept the resignation of her Ministry, 'and her readiness to dissolve this Parliament as soon as the state 'of public business would permit. Under these circumstances, I 'advised Her Majesty that although the present constituency was 'no doubt as morally competent to decide upon the question of the 'disestablishment of the Church as the representatives of the con- 'stituency in this House, still it was the opinion of Her Majesty's 'Ministers that every effort should be made with a view that the 'appeal, if possible, should be directed to the new constituency 'which the wisdom of Parliament created last year; and I expressed 'to Her Majesty that, if we had the cordial co-operation of Parlia- 'ment, I was advised by those who are experienced and skilful in 'these matters that it would be possible to make arrangements by 'which the dissolution would take place in the autumn of this year.' (*Hansard*, vol. cxci. 1693. May 4, 1868.)

Mr. Bouverie, who has usually been regarded as one of those members of the House of Commons who were best acquainted with its rights and with the rights of Parliament, places in a true light the consequences of interposing the authority or choice of the Sovereign between the Government and the House. 'The policy of 'these counsels appears to be to try to set the two Houses 'at loggerheads with one another, and to put the House 'of Commons at variance with the Crown. In ancient 'times we had perpetual quarrels and differences with 'the Crown, and for more than one hundred years these 'quarrels continued. They were of a most portentous 'character, for there were two rebellions, three revolu- 'tions, and one change of dynasty before we got the sys- 'tem of government in the right groove, and established 'that mode of government which brought the Crown into 'constant harmony with the House of Commons. That 'mode of government was that the House of Commons 'gave its support to the Government, and the Govern- 'ment represented the Crown. But if the views now 'put forward by the right hon. gentleman (Mr. Dis- 'raeli) were to be carried out, no long time would 'elapse before there was a renewal of those differences 'between the Crown and the House of Commons which 'all who take an interest in good government must 'have hoped had ceased for ever.'[1]

There are two other modes, besides those of dissolution and prorogation, in which the Government have availed themselves of their position to bring pressure to bear on recalcitrant Houses; but both these methods may be treated as if they were obsolete, though it would be impossible to allege that they could never be revived.

[1] *Hansard*, vol. cxci. May 4, 1868.

It is not so very long ago that it was the custom for the first trial of strength between opposed parties on the reassembling of Parliament after a dissolution to take place in respect to the election to the Speakership. The eager controversy to which such elections could give rise when treated from a party point of view is well illustrated in a passage of the Memoirs of Lord Melbourne, which relates the circumstances of the candidature of Mr. Spring Rice for the office of Speaker.[1] The vastly superior practice would now seem to have taken firm root of treating the Speakership as no longer a political office;—a change which was illustrated by the retention in office, or rather the fresh proposal for office, of Mr. Brand, previously the 'whip' of the Liberal party, who, having been first appointed by a Liberal Government, was reinstated in office by the Conservative Government on its accession to power in 1874. The other right, of creating fresh Peers, has already been alluded to, in the chapter on Parliament, and is not likely to be recurred to again, except on the occurrence of a crisis which cannot now be anticipated.

When it is remembered that these apparently extensive rights on the part of the Government, of dissolving one House and largely affecting the composition of the other, are at last subject to the judgment and control of the House of Commons, either as existing, or as newly elected, it is found that the reciprocal dependence of the Houses and of the Government is as complete as it can well be made; and that if a Ministry goes politically astray, or attempts the slightest

[1] See McCullagh Torrens' *Life of Lord Melbourne*, vol. ii. chap. 3.

violence to the Constitution, it can only be with the deliberate assent, express or implied, of the House of Commons.

2. The checks on the Government supplied by the mere fact of general responsibility to Parliament, and by the relations of confidence and courtesy which it has been seen now of necessity prevail as between the Government and the two Houses, especially the House of Commons, may not prove wholly adequate to prevent an extreme or unauthorised use of the Royal prerogative, or a gradual practice of trespassing on the claims of Parliament as asserted against the Royal prerogative, in case it happens that the Ministry are supported by a strong, united, and faithful majority in the House, and this majority happens, from some accidental reasons, or perhaps from mere temporary apathy, to prefer to show allegiance to the Government instead of conforming to the constitutional requirements of the House in the aggregate and of the country at large. Where a Government is thus supported, there is no legal limit, and it is difficult to find a moral or political limit, to the lengths they may go in asserting the most extreme, far-fetched, and even obsolete claims of the Royal prerogative; and it is always open to them and their legal adherents in both Houses to affix what interpretation they please on all doubtful points of law or practice. It is well known that the English Constitution, by its theory as legally expressed, confers almost exorbitant rights of initiative at least, and in large branches of business of direct executive action, on the Crown, as represented by its responsible Ministers. The following passage from the introduction prefixed to the edition of 1878 of Mr. Walter Bagehot's work on the English

Constitution puts in a compendious form the extreme doctrine as it can alone be properly stated in legal text-books:—

'I said in this book that it would very much sur-
'prise people if they were told how many things the
'Queen could do without consulting Parliament, and it
'certainly has so proved, for when the Queen abolished
'purchase in the Army by an act of prerogative (after
'the Lords had rejected the Bill for doing so,) there was
'a great and general astonishment. But this is nothing
'to what the Queen can by law do without consulting
'Parliament. Not to mention other things, she could
'disband the army (by law she cannot engage more than
'a certain number of men, but she is not obliged to
'engage any men;) she could dismiss all the officers,
'from the General Commanding-in-Chief downwards;
'she could dismiss all the sailors too; she could sell off
'all our ships of war and all our naval stores; she could
'make a peace by the sacrifice of Cornwall, and begin
'a war for the conquest of Brittany. She could make
'every citizen in the United Kingdom, male or female,
'a peer; she could make every parish in the United
'Kingdom a "university;" she could dismiss most of
'the civil servants; she could pardon all offenders. In
'a word, the Queen could by prerogative upset all the
'action of civil government within the realm, could
'disgrace the nation by a bad war or peace, and could,
'by disbanding our forces, whether land or sea, leave
'us defenceless against foreign nations.'[1]

It may be well to append to this extract another from Mr. Erskine May's 'Constitutional History,' in which

[1] *The English Constitution.* By Walter Bagehot. Introduction to the 2nd edition, p. xxxvi.

he, in his edition of 1871, takes a sanguine view of the real political influence of the Crown, while he attributes the advantages of this influence rather to the active vigilance of Parliament than to the extension of the influence itself.

'As the influence of the Crown constitutionally 'exercised has ceased to be regarded with jealousy, its 'continued enlargement has been watched by Parlia- 'ment without any of those efforts to restrain it which 'marked the Parliamentary history of the eighteenth 'century. On the contrary, Parliament has met the 'increasing demands of a community rapidly advancing 'in population and wealth, by constant additions to the 'power and patronage of the Crown. The judicial 'establishments of the country have been extended by 'the appointment of more Judges in the superior 'Courts,—by a large staff of County Court Judges, 'with local jurisdiction,—and by numerous stipendiary 'magistrates. Offices and commissions have been mul- 'tiplied, for various public purposes; and all these 'appointments proceed from the same high source of 'patronage and preferment. Parliament has wisely 'excluded all these officers, with a few necessary excep- 'tions, from the privilege of sitting in the House of 'Commons; but otherwise these extensive means of 'influence have been entrusted to the executive Govern- 'ment, without any apprehension that they will be 'perverted to uses injurious to the freedom or public 'interests of the country.'[1]

It is evident, then, that by the letter of the law the Government of the day has, in almost every region of

[1] May's *Constitutional History*, vol. i. p. 164.

affairs, enormous opportunities of independent action, under the cloak of exercising one or other of the prerogatives of the Crown. When it is said that a sufficient constitutional check is provided against abuse by the responsibility of Ministers to Parliament, it must be borne in mind that Ministers are for the moment only responsible to the Parliament as it is composed at the time, and that, as was said above, a servile majority might succeed in giving substantial reality to practices and doctrines condemned by the undoubted genius and traditions of the Constitution. The remedial action available in such a case is threefold. In the first place, there is the hopeful possibility that the next Parliament will abandon the wayward courses, unpatriotic subserviency, or flickering indifference of purpose, which gave a temporary lustre to what were in truth the miasmatic products of decay and not the natural signs of healthy life. In the second place, there is the persistent appeal, within the Houses themselves, on the part of the minority, however small, to the best-established constitutional principles, even in moments when those principles are being most signally set at nought. It is much, that at least the truth should be heard; and it is the usual result of uttering truth that it is re-echoed again and again in unexpected quarters, finding a response among, it may be, only a few here or a few there, but nevertheless by its inherent value and by its consistency finally supplanting everywhere the weakness, the selfishness, and the essential worthlessness of error. Even a generation is not too long a time to hope and wait for the resurrection of great constitutional truths, buried for a time beneath the load of political selfishness or apathy. But principles

cannot rise again unless they are really sown, although it be in weakness. It is, then, the paramount duty of every statesman and every party, however insignificant, who suspect the minutest infringement of the Constitution by the Government, and who see that infringement in the way to be erected into a principle by the acclamations of an intolerant and tyrannical majority, to cry aloud in the streets, and in distinct tones to alarm the country. The country may not listen to the alarm then and there, but it must listen, hear, and obey sooner or later, if it is to live. In the third place, there is the process of formulating with ever-increasing precision the exact duties which the Government owes to the House in respect of making it acquainted, at the earliest possible moment, with all executive measures to which the Royal prerogative properly extends, and affording it the fullest opportunity of acting freely, deliberately, and decisively in all those matters for which the concert of the House with the Crown, at some stage or other of the proceedings, will be imperatively required. The leading topics on which such punctilious precision seems, by recent experience, to be most urgently demanded are, (1), Foreign Affairs; (2), Financial Affairs; (3), the management of the Army and Navy; and (4), Colonial administration.

(1.) Foreign Affairs. There are several causes which have concurred to bring about the fact that it is only within a very few years that the House of Commons has roused itself from the apathy in respect of foreign affairs into which it had sunk since the conclusion of the wars with the French Empire in 1815. For the first fifteen years or so after the date of the Treaty of

Vienna, a pause, partly of exhaustion, and partly of natural repose from labours accomplished, ensued, and all foreign policy was gathered up in the general desire of the leading European States to sustain the complicated and fragile settlement brought about by the Treaty, in the stability of which so many States, great and small, had a direct and private concern. From about the year 1829 to 1846, English attention was distracted and absorbed by the unprecedentedly active legislation in which, under such leaders as Sir Robert Peel and Lord John Russell, the country was engaged. To this period belong the Emancipation of the Roman Catholics, the Reform of Parliament, the re-adjustment of public Corporations and Endowments, the establishment of Railways, the Bank Charter Act, and the culmination of the successful struggle for the abolition of protective duties on corn. Between 1846 and 1848, the invasion of the newly-constituted Republic of Cracow by Russia, and the apprehensions of an increase of French influence in Spain by the possible marriage of a French Prince to the Queen,[1] were events which seemed to arouse the House of Commons, and, through the discussion of them, to prepare the way for a new era of foreign policy, which dates from the European revolutions in 1848. It became now quite impossible for England, or for the House of Commons, to be indifferent to what was going on abroad, or to forbear from adopting some distinct line of policy. A number of circumstances,—among which the peculiar temperament of Lord Palmerston at

[1] An interesting account of the Spanish marriage question from the point of view of M. Guizot, who was personally concerned in the negotiations, together with a defence of his conduct and the French policy, will be found in the sixteenth chapter of his *Memoirs of Sir Robert Peel.*

this period, and the enormous development of trade consequent on the abolition of protection of corn are prominent,—combined to give currency to a doctrine which was hitherto unknown in English political phraseology,—that of non-intervention. The doctrine, indeed, did not suffice to prevent the Crimean War in 1853; but at the close of that war the doctrine, reinforced rather than otherwise by the vicissitudes of the war and by its uncertain results, assumed fresh sway, and in fact had a dominant effect on English politics during the whole period of nearly twenty years which covered events of the utmost magnitude and lasting importance on the Continent of Europe and in the United States. From 1856 to the accession of Mr. Disraeli's Ministry in 1874, it is not saying too much to assert that the one desire of England and the House of Commons was to vindicate its neutrality. At the time, indeed, of the war for the liberation and unification of Italy in 1859, there was many an Englishman whose heart burned within him because his country seemed only to look on and pass by on the other side. In the Sleswig-Holstein war of 1864 there were those, in and out of the House of Commons, who charged the country and the Government with culpable laxity in the observance of treaties for not coming to the active aid of Denmark. During the Franco-German war of 1870–1871 there were influential and articulate-speaking parties in favour of coming to the help either of Germany, from a supposed spirit of hereditary alliance, or of France, because of the alleged destiny of England to be the champion of the weak, if not because of obligations to her most recent allies. It was, however, during the civil strife in the United States that the

doctrine of English neutrality was most severely tried;—during the earlier part of the struggle the general right of revolution, anywhere and by anyone, seeming to claim recognition at the hands of England, and in the latter part of the struggle the prospect of emancipating four millions of slaves seeming to command English sympathy irresistibly in favour of the Federal armies.

It is a remarkable fact, however, that, in spite of all these occasional sympathies and antipathies, there was hardly, at any moment, a thought of England's doing more than keeping free from entanglements with the wars and tumults of other States. This is usually attributed to the influence of Lord Palmerston, and sometimes also to an ignoble and unpatriotic spirit of indifference, supposed to belong to a rather fictitious assemblage of persons ignominiously styled either 'the Peace-at-any-Price Party,' or 'the Manchester School.' Whatever were the real cause, there is no doubt that down to the time at which the great legislative efforts for the disestablishment of the English Church in Ireland, the provisional settlement of the Land Question in that country, and the institution of a system of national education in England, were finally completed, and Mr. Gladstone retired from office at the commencement of 1874, only the coldest and most superficial interest in foreign affairs could ever be excited in the House of Commons. In 1857, indeed, the iniquitous war with China arising out of the 'Arrow' controversy, and in the same year the resentment of the country against the proposal to amend the Law of Conspiracy for the purpose, presumedly, of better protecting the Emperor of the French, stirred the House of Commons from its lethargy, and for the moment made foreign

affairs take precedence of every other interest. But even in these cases it was, it is to be feared, rather the party question which was the intrinsic centre of interest; and the show of cosmopolitan zeal, if real, was certainly fleeting. The country and the House of Commons determined to have peace and neutrality, and they supported Lord Palmerston mainly because he contrived to secure them. Thus the tale of foreign policy in the House of Commons from 1815 to 1874 is first that of exhaustion or patience, then that of distraction or of absorption in home affairs, and lastly that of deliberate non-intervention or insulation.

It is not necessary to attribute to the Government of Lord Beaconsfield, which came into office in 1874, the extraordinary revival of concern in foreign policy which has of late been witnessed in the House of Commons. Events had long been preparing in the East of Europe, and could not but be immediately precipitated. The question must have been in any case shortly propounded to England, as to whether the policy of the Crimean War, and of the Treaty of Paris, was to be actively persisted in and maintained, or whether it was to be definitively abandoned. Even if England or Russia could have waited, the misgoverned and outrageously oppressed provinces of European Turkey could not wait. The Herzegovina led the way in active revolution. Servia lost little time in declaring war. Montenegro armed, with too well-accustomed zeal, to defend itself and its Slavonic neighbours; Bulgaria was being tortured to death upon the mere suspicion of insurrection; and the Russian armies were being propelled to the frontier by an irresistible weight of Slavonic sympathy. By the Treaty of Paris

of 1856, England was one of a number of Great Powers which had succeeded in substituting themselves for one of them (Russia) as the guardians of the Christian provinces of Turkey against the maladministration which had been the real occasion of the Crimean War. The question for the British House of Commons was, whether England was to support the policy of the Treaty to which she was a party, by forming a combination with the other parties to it for the purpose of re-constituting an arrangement which in its earlier form had signally and confessedly failed; or whether she was to leave the reconstruction of Eastern Europe to any Power which would undertake it, whatever might be its ulterior or secondary motives in addressing itself to the task. It unfortunately happened, however, that another set of considerations crossed the path of English politics, which may be compendiously expressed by the words 'British interests.' The policy of the Crimean War and of its main advocates, such as Lord Palmerston, was not one merely of philanthropic zeal for the good government of other countries, but had also been directed to the re-establishment of Turkey and the weakening of Russia. It was believed that Turkey was the best or only available barrier against an amount of Russian aggression which might ultimately terminate in a competition between England and Russia in the region of the Indian frontier. This faith soon grew into a passion, and has long survived as a lasting enthusiasm. Whatever its value, it has done more to re-awaken the interest of the British Parliament in foreign policy than any other problematical speculation extending over the future of politics. There were at least three distinct views, all tenable, and each in fact held in some quarter or other:—either that England,

as one of the leading States of Europe, owed a duty of humanity to the distressed provinces of Turkey, of the same kind that it had previously recognised and conformed to in the case of Greece and of Syria; or that England was bound by the traditions of the Crimean War to form an *entente cordiale* with the other parties to the Treaty of Paris, for the protection of the oppressed provinces equally against the ascendency of Russia and the crushing tyranny of Turkey;—or that it appertained to the vital interests of England that she should intervene to support, at any cost, and to the neglect of every other consideration, whether of philanthropy or of obligatory duty as defined by treaties, the tottering fabric of Turkish rule. Whichever of these views commended itself, there was one firm position held by every statesman, and almost every English citizen who was worthy of the name,—that is, that England could no longer adhere to the policy of standing on one side and leaving things to take their chance or merely settle themselves according to the chapter of accidents. The usual signs of a really inflamed state of public interest and of divided opinion manifested themselves throughout the country; and the duty was instantly cast on the Government of interpreting as best they might the popular sentiment, or at any rate of promoting a policy which, with all their opportunities of knowledge and deliberate counsel, they could conscientiously adopt, as being that most likely to reconcile a due regard to British interests with a firm resolution to discharge British duties. Naturally, the House of Commons became the main arena in which the struggle between opposite views of policy was ultimately fought out. The general result is known to all, though the

consequences are too numerous and manifold to admit as yet of any but the vaguest conjecture. What is alone, however, of relevance here is, that it has been through the medium of this energetic rivalry between the minority in the House and the majority supporting the Government that the true relations which ought to exist between the Crown and the House of Commons with respect to foreign affairs have been ventilated and discussed as never before. If it be thought that somewhat too much of political passion or party spirit has entered into these discussions, that is only saying that the hard constitutional rules, scarcely as yet fully fashioned, have been forged in that red-hot furnace in which alone such strong and immortal instruments can be shaped for use.

The general upshot of the constitutional controversy between the minority and the Government relates to the following obligations alleged to be incumbent on the Government.

(i.) It is incumbent on the Government to produce all papers and despatches relating to current engagements of all sorts with foreign Powers at the earliest moment compatible with a due regard for the public interest, and whether they are asked for by the House or not.

(ii.) It is incumbent on the Government to take the House into its confidence at the earliest moment as to all definitive arrangements on the verge of being completed, the result of which, when completed, would be to charge the finances of the country, to increase the treaty obligations of the country, or to affect the national dignity and honour.

(iii.) It is morally as well as politically incumbent on the Government, and on every member of it, to be

consistent in the report of events and negotiations as they are successively disclosed, and not, either by omission, or misrepresentation, or perversion, or abuse of language, to run the risk of conveying a meaning inconsistent with the truth, though it be not always expedient or necessary to reveal the whole truth.

The purpose of Parliament in demanding such an exact account of current negotiations as the duties here described would involve, is not only in order to be able at the earliest moment to foresee and prepare for its own contingent action, nor to guard against the possibility of Ministers diverging from time to time from paths which have been once clearly traced out. There are still greater perils than those here indicated;—or rather the perils here indicated are only very innocent forms of the hazards which are still left open, even when the strictest formal requirements of the Constitution are complied with. It has already been seen, in treating another part of the subject, that it is quite possible for the Sovereign himself to have an active personal concern in foreign policy, and occasionally to intervene, either by initiation, over-zealous superintendence, remonstrances, cautions, or impulses given in certain specific directions, with the action of the Cabinet, in such a way as to impair its independence and to perplex its relations with Parliament. Where the Cabinet, or even the influential Chief of the Cabinet, is content to acquiesce in this intervention, and to assume, in the presence of Parliament, all the responsibility it imposes, there is no formal constitutional check provided against the country being, to the extent of the intervention supposed, governed by the direct will of the Sovereign, and not by the deliberate autho-

rity of the Cabinet in the unhampered exercise of the special and confidential powers delegated to it by Parliament. If there was any intervention of this sort during the earlier stages of the Crimean war, certainly Lord Aberdeen seems not to have repudiated it; and yet, up to the time of the publication of the Prince Consort's Life, more than twenty years afterwards, neither House of Parliament could have conjectured, except by the vaguest suspicion, what was the real source of reticence at one time, assertion at another, and inconsistencies at any time.

But, apart from such direct influence brought to bear on the Cabinet by the Sovereign, which is so plainly outside the limits of the proper constitutional action of the Sovereign in England, and for which Parliament can, if once its attention be awakened, provide an adequate remedy by extorting from Ministers a plenary account or anticipation of their policy, wherever possible, and condemning in the severest fashion, all ambiguity, inconsistency, hesitation, or recantations, —there is another hazard, far more inaccessible to the ordinary modes of Parliamentary censure, or even detection. It is possible that the Chief of the Cabinet himself may have a policy of his own, which is not that of Parliament, nor of any party in Parliament. He may give currency and weight to this policy by obtaining the concurrence and sympathy of the Sovereign. If the policy be of too strange or startling a nature to be instantly divulged, even to the members of his own Parliamentary majority, he may certainly rely upon their indulgence and support when ultimately he comes before Parliament for a ratification of his acts, or an indemnity for his irregularities. In an extreme case,

it may happen that such a Minister is in such sole possession of his political theory and programme, that he fails even to communicate a belief in it to his own colleagues. If these colleagues, as a body, consider their personal allegiance to their chief, or their general agreement with him on other matters, or their hope of moderating or counteracting opposed views, or their desire to retain office, sufficient to overcome the differences of opinion, and to justify them in remaining in the Cabinet, it is hard indeed for Parliament to distinguish what may be the most wild and hare-brained scheme of a single enthusiast from the long-meditated thought, treasured experience, and combined counsels, of a body specially selected from the ablest statesmen in the two Houses. The only loopholes through which an occasional gleam of light may travel are supplied by the inevitable inconsistencies and surprises which the heads of the different departments must, in a divided Cabinet, occasionally disclose, and the almost inevitable fact that at certain crises in the negotiations one and another of the most eminent and scrupulous members of the Cabinet will publicly abandon it.

It is one of the gravest and most pressing constitutional questions at the present day, by what new Parliamentary machinery, or by what new adjustments of ancient and well-tried machinery, Parliament can guard against undue influences over the Cabinet exerted either by the Sovereign or by its Chief, and against the sort of treacherous anarchy that may long co-exist in a Cabinet with formal unity.

The history of the four Sessions from 1876 to 1879 inclusive has thrown so much light on the constitutional problems here indicated, and such frequent illustrations

have been afforded of the necessity of insisting on the three sorts of checks before enumerated,—the exacting at the hands of Ministers that they shall give the earliest and the fullest communication of all negotiations in progress, and of the general policy advocated, —that they shall not pledge Parliament and the country to definite acts and liabilities except in cases of the most commanding necessity, which must always be of a rare and exceptional kind,—and that they shall be habitually truthful, unambiguous, and honest in imparting information to Parliament—that, on these accounts alone, a reference to this history, so far as its constitutional can be separated from its political side, cannot be evaded in this place. But the subject has still stronger claims to consideration from the fact, that the events concerned,—that is, the circumstances which led up to the Berlin Congress of 1878, and the establishment of a new Imperial era in India, through the aid of the Viceroy, Lord Lytton, accompanied by an Afghan war,—are of themselves of the utmost importance, and are likely to afford material for permanent political differences of opinion; that, for the first time during the century, a large organised minority of the House of Commons was, at every leading stage of the events and negotiations, in direct and uncompromising resistance to the policy and acts of the Government; and that throughout all the political debates there was interwoven a web, often very entangled, of constitutional controversy, which, for the breadth of ground it covered and the radical depths to which it again and again reached, was either unprecedented, or could at best only find a precedent in the time of Edmund Burke's dissertations,—often, it is said, to bare walls,—on the

constitutional relations of England to her Colonies and to India.

The first step which has to be noticed is the purchase by the British Government, in November, 1875, of the large bulk of the shares in the Suez Canal. As a financial measure, this subject will be alluded to later on. As a political measure, it is sufficient to say that the first mention of it in Parliament was on the 21st of February, 1876, when a Motion was made in the House of Commons by the Government, for a supply to the amount of four millions, the purchase-money of the shares. The bearing of the Suez Canal on the relations of England and India must not be left out of mind. It was four days before this, on the 17th of February, that Mr. Disraeli brought forward his motion for leave to bring in a Bill to alter the style and title of Her Majesty. As has been noticed before, it was his intention to avoid all communication to the House of the form of the new title, and it was only on the urgent and indeed rebellious remonstrances met with from all quarters, that he, on a later day, intimated that the title would be 'Empress of India.' The significance of the title notoriously was, that British India was no longer to be treated as a multiform and composite dependency, only a limited part of which was strictly annexed to the British soil, and large outlying portions of which were more or less tributary provinces enjoying various degrees of independence and even princely dignity; but that, by name now, and in fact hereafter, British India was to be converted into a homogeneous unit of the British dominions, all tokens of actual or historical independence being annihilated in the glaring lustre of the English Imperial Crown.

While these events were somewhat rapidly proceeding, both at home and abroad, other events, destined to converge to the same ends, were happening in the East of Europe. The year 1877 and the beginning of 1878 were occupied by the Servian, Montenegrin, and Russian wars against Turkey, terminating in the ratification of the Treaty of San Stefano on March 17, 1878. But the policy of the English Government was not to be defeated or defrauded by Russian successes and the termination of the war. As soon as Parliament met, some days before its usual time, in January 1878, the rumours of the newspapers were instantly confirmed; a vote of credit for six millions was demanded; it was announced that the British fleet had sailed for the Dardanelles; and, on both these grounds, Lord Carnarvon stated in the House of Lords that he had retired from office. On the 28th of March, Lord Derby, the Foreign Secretary, similarly retired from the Cabinet, on the grounds, as it afterwards appeared, that the Cabinet had determined to make some arrangement with Turkey for the annexation of Cyprus or some other like station, and that the British fleet was ordered to Constantinople.

On the 1st of April the Government produced in the two Houses a message from the Queen announcing that 'the present state of public affairs in the East, 'and the necessity in connection therewith of taking 'steps for the maintenance of peace and for the pro-'tection of the interests of the Empire, having consti-'tuted, in the opinion of Her Majesty, a case of great 'emergency within the meaning of the Acts of Parlia-'ment in that behalf, Her Majesty deems it proper to 'provide additional means for her military service.'

On the 17th of the same month of April, it was announced that the British Government had given orders 'for the despatch of 7,000 native Indian soldiers to 'Malta, the troops selected comprising the 9th Bengal 'Cavalry, the 1st Bombay Light Cavalry, the 2nd and '13th Ghoorkhas, the 31st Bengal Regiment, and the '25th Madras Regiment.' This topic will have to be specially considered under a later head.

On the 3rd of June, the German Ambassador in London presented a note to the Marquis of Salisbury, Secretary of State for Foreign Affairs, containing an invitation to the Powers, Signatories of the Treaties of 1856 and 1871, from the German Emperor, to meet 'in Con-'gress at Berlin, to discuss there the stipulations of the 'preliminary treaty of San Stefano concluded between 'Russia and Turkey.' The 13th of the same month was proposed as the day of meeting. Lord Salisbury immediately replied 'that Her Majesty's Government 'will be ready to take part in the Congress' at the date mentioned. On the next day, June the 4th, a 'Convention of defensive alliance between Great Britain 'and Turkey' was concluded at Constantinople. The first and principal article of the Convention stipulated that 'if Batoum, Ardahan, Kars, or any of these places, 'shall be retained by Russia, and if any attempt shall 'be made at any future time by Russia to take posses-'sion of any further territories of His Imperial Majesty 'the Sultan in Asia, as fixed by the Definitive Treaty 'of Peace, England engages to join His Imperial 'Majesty the Sultan in defending them by force of 'arms.' The article further stipulated that 'in return 'the Sultan promises to England to introduce necessary 'reforms, to be agreed upon later between the two

'Powers, into the government, and for the protection, 'of the Christian and other subjects of the Porte in 'these territories; and in order to enable England to 'make necessary provision for executing her engage-'ment, His Imperial Majesty the Sultan further consents 'to assign the Island of Cyprus to be occupied and 'administered by England.'

The Congress was opened at Berlin on the 13th of June; and on the 13th of July the Berlin Treaty of Peace was signed, the general result of it being to confirm Russia in the possession of some of the towns and territory acquired by the war, to liberate some of the provinces of Turkey from their dependence on that Power, and to increase the amount of independence of other provinces already nearly emancipated. Arrangements were also contained in the Treaty for a provisional occupation of such ill-governed provinces as were not yet adapted for independence; and, in outward form at least, the limits of the Turkish dominions were traced more favourably for Turkey than by the Treaty of San Stefano, and her dignity as one of the Powers of Europe was re-established. On the next day, the 14th, the Island of Cyprus was occupied by Great Britain, and the British flag hoisted in its principal towns.

The scene is now shifted from Europe to Asia; but it is the same drama, and there are the same actors, both in the front and behind the stage. The dates are significant. On the 22nd of July,—that is, within a fortnight of the signature of the Treaty of Berlin,—a Russian mission arrived at Cabul, Afghanistan. The mission was a small one, consisting of three superior European officers, with an escort; and the chief of the mission delivered to the Ameer a letter from the Emperor of

Russia. On the 21st of September, a British mission, under Sir Neville Chamberlain, started from Peshawur for Afghanistan. There were in the mission eleven British officers, four native gentlemen, two hundred and thirty-four armed soldiers, and, with the camp-followers, the whole amounted to nearly a thousand men. There were three hundred and fifteen camels, two hundred and fifty mules, and forty horses. It was reported that the cortège extended over a mile in length. This mission had its progress interrupted on the frontier of Afghanistan; and on the 1st of November an ultimatum from the Viceroy of India was addressed to the Ameer, demanding the privilege of sending a British mission to his capital, and requesting a reply before November the 20th. The reply not being received by midnight on November the 20th, at three o'clock on the morning of the 21st, the British army crossed the frontier, and war was commenced. On the 22nd, the Viceroy issued a proclamation at Lahore, announcing the commencement of hostilities in Afghanistan, saying that 'the 'Government of India cannot tolerate that any other 'Power should interfere in the internal affairs of 'Afghanistan,' and concluding with the words, 'Upon 'the Ameer Shere Ali alone rests the responsibility of 'having exchanged the friendship for the hostility of 'the Empress of India.' Parliament was summoned to meet on the 5th of December, and the Queen used the following language in opening Parliament:—'The 'hostility towards my Indian Government manifested 'by the Ameer of Afghanistan, and the manner in 'which he repulsed my friendly mission, left me no 'alternative but to make a peremptory demand for 'redress. This demand having been disregarded, I

'have directed an expedition to be sent into his terri-
'tory, and I have taken the earliest opportunity of
'calling you together, and making to you the com-
'munication required by law.' (This allusion to 'law'
refers to the 54th section of the 'Act for the better
'Government of India' of 1858:—'When any order is
'sent to India directing the actual commencement of
'hostilities by Her Majesty's forces in India, the fact of
'such order having been sent shall be communicated to
'both Houses of Parliament within three months after
'the sending of such order, if Parliament be sitting,
'unless such order shall have been in the meantime
'revoked or suspended, and if Parliament be not sitting
'at the end of such three months, then within one
'month after the next meeting of Parliament.')

In the meantime events had been marching on in India from another point. On the 1st of January, 1877, the Queen was publicly proclaimed Empress of India at Delhi, with almost unprecedented pomp and ostentation, in the presence of a vast assembly, to which all the princes and high dignitaries of India were either invited or summoned. On March the 14th, 1878, Lord Lytton, the Viceroy, succeeded in passing, in spite of the earnest remonstrance of some of the most experienced members of his Council, an Act for subjecting the Indian Vernacular Press to a system of arbitrary espionage and official denunciation, which recalls the memory and the ignominy of the worst days of modern France, and the lamentable blots on the liberty aspired to by England in the days of the Commonwealth.

In reviewing the history of these events, as thus summarised in chronological order, it is impossible

not to see that a distinct and continuous skein of policy runs through them all from first to last. It is not the purpose here either to expound the policy, or to estimate its value, absolute or comparative. It is sufficient to say, that at every stage of direct English action, the exhibition of hostility to Russia and of friendship for Turkey, an ostentatious defiance of presumed aggressive tendencies of Russia in the direction of India, and the consolidation and unification of English authority in India,—not to say the obtrusive display of English power and magnificence in that country,—are a set of objects all closely connected together, and to the furtherance of one or other of which every part of the recent transactions, so far as they emanated from the British Government, has directly tended. Even what were probably rather theatrical than practical elements in the scheme—that is, the adoption of the Imperial title, the transfer of Indian troops to Malta, and perhaps the sudden resolution of the Government to purchase the bulk of the shares in the Suez Canal—serve to point the connection between the European and the Asiatic policy. If any key were wanted to unlock some of the darker recesses of the policy, such a key may be found in the public assertion said to be made in some influential quarters at the time, that England was rather an Asiatic than a European Power; and in the corollary from this proposition, that the European policy of England ought to be mainly dictated by a regard for the influence and strength of England in Asia. Whether this be the true key or not, the policy itself is to the utmost extent distinct, coherent, consistent, continuous, and, it must be admitted, as viewed in reference to its own ends, suc-

cessful, at any rate to outward appearance, and for the time.

In the course of prosecuting this policy, during a period covering nearly four sessions of Parliament, a sum of four millions was expended for the purchase of the Suez Canal shares; diplomatic action was entered upon, necessitating an expeditious application to Parliament for credit to the amount of six millions; the reserve forces were mobilised,[1] and Indian troops were brought over to Malta, at an expense to which no Parliamentary limit was or could be assigned; indefinite obligations in Asia Minor and in Cyprus, involving a purely conjectural and incalculable amount of expense for the future, were undertaken; and an Afghan war was initiated, the pecuniary burden of which seems to have been uncertainly distributed between England and India.

Again, in the prosecution of the same policy, political responsibilities of the gravest sort were assumed over and over again by the Government in the name of the country. By the secret Convention with the Sultan, of June the 4th, England engaged herself to defend the

[1] According to the Parliamentary return of the circumstances and expenses attending the calling out of the Reserves, it appears that the number of men taken on the strength of the army from the first-class Army Reserve was 13,019, and the number of men who joined the Militia Reserve was 21,730. The total expenditure consequent on calling out the Reserves was 610,264*l.* This was subdivided as follows: Pay, 167,795*l.*; good conduct pay, 9,113*l.*; maintenance, 163,900*l.*; clothing, 188,602*l.*; travelling, 68,695*l.*; gratuities for good conduct, on discharge, 3,472*l.*; allowances for subsistence on discharge, 8,687*l.* A further sum on account of pensions was incurred, though not yet fully accounted for. Had no mobilisation taken place, charges to the amount of 84,658*l.* would have been borne in ordinary course.

Asiatic provinces of Turkey in case of Russia hereafter making any attempt to take possession of them. It was thus left to Russia to choose her own time and convenience for drawing England into a war with herself. By another portion of the same Convention, England entered into special and peculiar liabilities with respect to Cyprus, the most favourable interpretation of which must involve the moral and political duty of effectually administering the affairs of that island, with the prospect, if Russia should so will it at any moment, of having to hand back to Turkey the island with all its improvements, and without compensation for the expenditure lavished upon it. The same Convention certainly contains a moral engagement, likely to be interpreted strictly by the other Powers of Europe, that England will specially concern herself with preventing future maladministration in Asia Minor. The Treaty of Berlin, again, contained far more complicated provisions than did the Treaty of Paris of 1856; and England is made a party to all these provisions, and is morally responsible for helping to carry them into effect. Yet the terms of peace with Russia, as formulated in the Treaty of 1856, were discussed over and over again in the House of Commons; while no one outside the Cabinet, except the writers for the newspaper press, was allowed to have anything to say as to the English view of the policy which governed the Treaty of Berlin.

Lastly, in the execution of this continuous policy, constitutional problems have been started and peremptorily solved by the mere action of the Executive, which from their magnitude and complexity could only be satisfactorily settled after long Parliamentary debates,

conducted with all the freedom and responsibility attaching to the consciousness of action yet to be taken, and not with the weight of merely defending or assaulting acts which already belong to the historical past. The purchase of the Suez Canal shares incorporated for the first time in the principles of English government the notion that the State could have a financial interest in a commercial undertaking, not only conducted in another country, but conducted under the special license and superintendence of the ruler of that country. The result of admitting such a doctrine and acting upon it was, that England became pledged in a wholly new and peculiar way to the support of the existing Turkish and Egyptian dominion in Egypt; that large English political interests were rendered subservient to the decisions of local tribunals in a foreign country; and that English diplomatic and political action in Egypt, and indeed in Europe, was trammelled, or at least indirectly influenced, by a narrow commercial interest which could not but weigh, however slightly, upon the apparent purity and simplicity of the motives of the English Government. Of course it is not pretended here that these considerations were in themselves sufficient to counterbalance the importance of obtaining an additional security for the safety of the shortest route to India. It is only asserted that the purchase of the shares carried with it large and complicated consequences, and involved the advent of a new sort of relationship between European States, the entailing of which was a noticeable exertion of the Royal prerogative, in the absence of all assistance from, or consent of, Parliament.

The endeavour, strongly persisted in for a time, to

obtain from Parliament leave for the Crown to make any alteration whatever in the Royal Title by mere act of prerogative, under the delusive colour that the precedent of the change in the Royal Title at the time of the union with Ireland—when the form of the new Title could not have admitted of a doubt—was at all applicable, was another instance of the symptoms, characterising the scheme of policy now under consideration, of a disposition to exclude Parliament from concert or concurrence in acts of a grave constitutional nature.

The movement of the Indian troops to Malta is, however, admitted, even by those who justify it, to have been a matter of very doubtful constitutional right. It is a cardinal principle, first formally embodied in the Bill of Rights, and afterwards recited annually in the Mutiny Act, that 'the raising or keeping a standing 'army within the kingdom in time of peace, unless it 'be with consent of Parliament, is against law.' The Mutiny Act gives Her Majesty power to embody and maintain an army for the current year, and assigns the exact numerical size of that army. The complaint of the movement of the Indian troops to Malta, so far as it rested on constitutional grounds, was that, inasmuch as the Crown was not restricted in the number of native Indian forces it might embody, the practice of importing these native troops into Europe might avail to render wholly abortive the restrictions on the forces in the employment of the Crown, as contained in the Bill of Rights and the Mutiny Act. Ingenious defences of the constitutional position assumed by the Government were made by its legal supporters. It was said that, since the passing of the Bill of Rights, 'the

'Kingdom' had come to include Ireland, and therefore a strict interpretation of the clause in question would prevent the Government from sending troops to that country. It was also said that it is an inherent prerogative of the Crown to move 'all forces by sea and 'land' to and from any part of the British dominions; that, by a series of Acts for the government of India, including the Act of 1858 'for the better government 'of India,' Her Majesty was entitled to move any of her Indian forces 'beyond the external frontiers of Her 'Majesty's Indian possessions'; but that, except for preventing or repelling actual invasion, or under other sudden or urgent necessity, the revenues of India could not, without the consent of both Houses of Parliament, be charged with the expense. It is admitted, however, that Indian troops could not be brought within the limits of the United Kingdom. Whether all this reasoning was good or bad from a strictly legal point of view,—that is, as affecting to be a judicial interpretation of certain Acts of Parliament,—there is no doubt that the acceptance of it must wholly defeat the policy enforced by the Bill of Rights, and reasserted year by year in the Mutiny Act. This policy was, to prevent the Executive being able to lay its hand, in any event which it might please to call an emergency or a case of necessity, upon an indefinite number of troops, without having recourse to Parliament. The liberty of the people, and the confinement of the functions of the Executive within well-ascertained limits, were the objects in view. It may have been that the rule was occasionally transgressed by hard-driven Governments at moments when Parliament could not be consulted; but such vagaries were never erected into principles;

and the terms of the Mutiny Act, so far as it affected to fix the number of allowable troops, would become a mere fictitious deference to appearances, if it were conceded that the Crown could, by an exercise of its prerogative, compete when it pleased, on a European battle-ground, with the vast standing armies of the Continent, by the simple device of enlisting troops in India and moving them to Europe.

No subject has been more eagerly discussed of late than that of the province of Parliament in respect of the making of Treaties and the declaration of War. No prerogative of the Crown is more undisputed than that of taking the initiative in all negotiations with foreign Governments, conducting them throughout, and finally completing them by the signature and ratification of a Treaty. But a Treaty may involve a large expenditure of the national funds, possibly stretching over a period of many years, or obligations of a most onerous and responsible kind, in the performance of which the whole country has the keenest and most direct interest. Thus, while saving the dignity and claims of the Royal Prerogative, Ministers are generally not averse to making Parliament share, from a very early moment in the course of the negotiations, in the responsibility attaching to the final settlement in which they may result. Parliament also, through its control of expenditure and other effective checks, can do much to prevent undue secresy and to arrest diplomatic action in which it has no part. Nevertheless, emergencies may arise, especially in reference to the issues of an imminent war or a possible peace, in which the tardy and uncertain course of referring to Parliament might render negotiations impossible, or precipitate the issue in a way by

no means conducive to the national interests. In view of these emergencies, and of these only, the Royal Prerogative of concluding treaties and declaring war may be justified in reason, and by the existing Constitution is justified in fact. But to use this Prerogative, not in order to provide for unforeseen crises, but to carry into effect a deliberately planned foreign policy, extending over many months and having a long series of closely connected links, without encountering the criticism or opposition of Parliament, is to strain the Prerogative to a use which, if frequently indulged in, must render it first deservedly unpopular, and then wholly out of harmony with constitutional government. It is a bare fact that during the progress of the British diplomatic movements which terminated in the Treaty of Berlin of 1878, or more properly in the Afghan war of that year, Parliament never had an opportunity of expressing its mind on any one of the important and complicated engagements to which the country was being committed, or upon the policy of the war on the North-West frontier of India. The subjects were indeed over and over again discussed in Parliament, but always subsequent to irreparable action having been taken by the Government. The Convention which included the transfer to England of the administration of Cyprus, and the undertaking to guarantee in certain cases the immunity of the Turkish Asiatic possessions, reached to a number of indefinite and serious obligations which were made binding on the country for an indefinite period of time to come. The position taken up at the Berlin Congress, and the wholly new starting-point of policy in reference to the North-West frontier of India, were not the product of sudden emergencies for

which the Government was bound to provide before it had a chance of ascertaining the mind of Parliament, but were necessary steps in a uniform and integral policy which might have been communicated to Parliament months beforehand, and yet was sedulously, and on some occasions, it must be said, unscrupulously, veiled from it. Thus the constitutional conduct of the Government in this case must not be measured with reference to the habitual practice of submitting all important treaties to the judgment of the Houses before signature or ratification, because in the large majority of cases the Government has little to gain from privacy, and much to gain from casting a large share of its responsibility on Parliament. The conduct of the Government in such a case must rather be judged by reference to the question whether they have abused the prerogative by converting that right of secret diplomacy, which only exists and ought to be cherished on behalf of grave national crises when the last interests of the nation are at stake, into a means, fortunately happening to be at their disposal, for evading the legitimate scrutiny of Parliament in respect of matters in which the country has the profoundest interest, and for the right conduct of which the House of Commons is responsible to its constituents, and both Houses of Parliament to the country at large and to posterity.

(2.) The importance of checking the exercise of the Prerogative of the Crown in respect of financial affairs is not at present in much danger of being overlooked, though it may be doubted whether on the whole the check is as yet adequately applied. A financial policy is so closely connected with every other

part of a general policy that if the latter is hasty, spasmodic, and secret, or if it is secret but deliberately calculated, in either case Parliament must experience a difficulty in obtaining from Ministers a plenary confidence as to the amount of supplies which will be needed throughout any particular session. Side by side with a policy of startling surprises in the region of foreign politics, there has grown up the practice of presenting supplementary Budgets almost up to the last day of the session. This practice has indeed been strongly denounced, and deservedly so, because Parliament is thereby forced to make grants under pressure partly of time and partly of necessity, and, in assenting to the scheme of taxation originally proposed, is likely to be led into financial mistakes through having only a part of the whole case before it. Another serious danger proceeding from a reckless use of the Prerogative in the matter of originating a financial scheme for the year is liable to accrue, and does in fact accrue, from a disposition on the part of Ministers to raise money for the year's expenses rather by loan than by taxation. In this way, the pecuniary expense of an adventurous policy is lightly borne or entirely kept out of sight; and, did the practice become common, one of the most salutary checks on the irresponsible action of Ministers in the conduct of foreign affairs would be removed,—the blaze of national ascendency glittering in the eyes of the constituents of the dominant majority who support the Government, while the burdens and expenses which attend the winning of this ascendency have to be provided for by some Government of the future, and to be endured by the supporters of that Government in the country.

It is perhaps necessary to notice also that scarcely any Parliamentary check at present exists to prevent such wholesale commercial dealings on the part of the Government as are instanced in the purchase of the Suez Canal shares. It was just one of those cases in which the acquisition presented so many superficial attractions to the vulgar eye that, so soon as Parliamentary criticism was possible, the field was occupied by an unanalysed sense of universal approval. Yet the undoubted value of maintaining and securing the British rights over the use of the Canal could be wholly distinguished from the very questionable method actually pursued for this end. The policy of venturing the credit of the Government and the country in a commercial undertaking subjected to the commercial hazards and political chances incident to the foreign State which has a sovereign right over the whole undertaking and a proprietor's claim over the land and water to which it relates, might well be a matter for anxious Parliamentary discussion rather than for secret and autocratic decision.

(3.) Sufficient has almost been said in referring to the conduct of the British Government in summoning the Indian troops to Malta, in calling out the Reserve Forces, and in obtaining from Parliament a large vote of credit in view of possible military movements, during the progress of the negotiations leading up to the Congress of Berlin in 1878, to make it clear that Parliament has much to do to hold its own against the Ministers of the Crown in the matter of Army and Navy administration. It was at one time held that the management of the Army was the point of contest between the rival

departments of the Constitution, Parliament and the Crown. A long-standing compromise has manifested itself in the passing of the Annual Mutiny Act (lately amended and to some extent transformed); and in the cautious enumeration of the number of soldiers to be embodied, and the sparse dealing out of the supplies needed for military operations. But it has already been seen that these defences are getting somewhat insecure, in the presence of the almost recognised right of evolving an army of almost any size from the Indian seed-plot, of using reserve forces without communication to Parliament in advance, and of obtaining large votes of credit for prospective military operations of an indefinite character, the nature of which Parliament is allowed only dimly to surmise.

(4.) The rights of the Crown in respect of the foundation and government of Colonial Dependencies are of the oldest and most undisputed kind. So long as these Dependencies were difficult of access, and, through the recognised principles of trade and policy, capable of rather increasing the wealth of the parent State than of drawing upon its resources, there was little to excite the attention of Parliament and to induce encroachments on the Prerogative of the Crown, or even to enjoin a vigilant criticism of the mode of exercising the Prerogative. But the impeachment of Warren Hastings and the War of American Independence together had the result of making henceforth Indian and Colonial affairs a well recognised department of Parliamentary action. The practical adoption of the principles of Free Trade in 1846 by the repeal of the Corn Laws, and of free Navigation in 1849 by the repeal of the Navigation

Laws, as well as the great extension of Colonial enterprise and of emigration during the present century, formed a group of causes which, in the aggregate, tended to make the government of the Dependencies of little less moment and difficulty than the government of the British Isles. As the Colonies increased in magnitude and in independence, the British Dominions approached more and more to the character of a great confederation, of which the several members were associated together by very various sorts of links, and with different degrees of tightness and of laxity. The system of political communities making up the British Dominions was henceforth an integral though composite unity, and must needs be governed by a system of policy which never neglected the relations of all the several parts to the whole and to each other. So far, again, from the Colonies being remunerative, they were frequently matters of expense, and, in time of war, might become matters of anxiety. The Indian Mutiny in 1857, the successive famines in India, and the financial embarrassments, have combined to render India a topic of the gravest political concern. The Dependencies in Canada, Australasia, and South Africa have given rise to a wholly unprecedented class of problems in respect of constitutional self-government, federation, and the abstract reciprocal duties of Colonies and their parent States. The question has also been raised of late, in something more than a purely speculative shape, as to what are the precise kind and amount of advantage which the Colony and the parent State severally draw from their connection.

It can, then, be no matter of surprise that Parliament has of late years specially interfered to restrict

the indefinite and irresponsible exercise of the Royal Prerogative in respect of Colonial administration. This has been effected, partly by substituting to an ever increasing extent the strict enactments of Statute law for the uncertain inclinations of the Royal discretion, and partly by submitting to public inquiry and discussion all executive acts of Ministers of the Crown concerned with the appointment, supervision, and change of Colonial Governors and other officials. The Viceroy of India and Colonial Governors have thus been subjected to the peculiar control of Parliament; and their policy and actions are more and more decisively imputed to the Ministers of the Crown, whose agents they are, and whose intentions they may be presumed in all their public acts to be carrying into effect. The more direct exercise of the Royal Prerogative in disallowing the Acts of Colonial Legislatures, in annexing or settling and administering fresh territories, and in providing for Colonial defence, has been progressively hemmed in by limits—somewhat indefinite indeed and not wholly irremovable—imposed by the inquisitiveness and scrutinising energy of Parliament.

Illustrations of the assumptions of Parliament in the matter of the government of Dependencies, and of the sort of close competition which has been of late proceeding between Parliament, on the one hand, and the Ministers of the Crown, on the other, are supplied by (i.) recent legislation for the purpose of ascertaining the extent of the Royal authority in India and of defining the legislative functions of the Viceroy; (ii.) the processes, conducted inside and outside the walls of Parliament, of annexing or settling such territories as British Columbia, the Fiji Islands, and the Transvaal; and

(iii.) the now recognised duties and responsibilities of Colonial Governors in the different classes of Colonies, as representing and, to some extent, personating the Crown.

(i.) By the 'Indian Councils Act, 1861' (24 and 25 Vict. cap. 67) the general legislative powers conceded by previous Statutes were confirmed for the Governor-General and his somewhat modified Council as constituted by that Act. The chief novel limitations were that no new laws or regulations should affect either that Act, or the Act of 1833, by which the commercial functions of the East India Company were abolished, or the 'Act for the better government of India' of 1858, by which the Government of India was transferred from the Company to the Crown. One noticeable feature of this Act is that, by the 23rd section, it gives (subject to the general restrictions on all legislation) power to the Governor-General, in cases of emergency, to make and promulgate from time to time 'ordinances for the peace 'and good government' of the territories legislated for, or of any part thereof. Every such ordinance is to have the force of law for the space of six months, unless disallowed by the Government at home, or controlled or superseded by some law or regulation made by the Governor-General in Council. The 24th section is of peculiar constitutional importance in its bearing on the relations of Parliament to the Crown. The section is as follows: 'No law or regulation made 'by the Governor-General in Council (subject to the 'power of disallowance by the Crown, as hereinbefore 'provided) shall be deemed invalid by reason only that 'it affects the Prerogative of the Crown.'

When reconstructing the Government of India in

1858, Parliament attempted to guard against the possible perils which might lurk in the large legislative powers conceded to the Governor-General in Council and to the Governor-General alone. The old Court of Directors and Board of Control were to a great extent reproduced in the 'Council of India.' This Council was to consist of fifteen persons, of whom, in the first instance, seven were to to be elected by the Court of Directors of the Company and eight were to be appointed by the Crown. Afterwards, vacancies occurring in the latter number were to be filled by the Crown, and those occurring in the former number by co-optation within the Council itself. Every member of the Council was to 'hold his office during good behaviour,' and could be removed only upon an address of both Houses of Parliament. The President of the Council was to be one of Her Majesty's four Principal Secretaries of State, or a fifth Secretary (the appointment of whom was contemplated by the Act) who was to be charged with all the administrative functions previously vested in the Court of Directors or Court of Proprietors of the Company. It was only, however, in respect of the 'grant or 'appropriation of any part of the revenues of India or of 'any other property coming into the possession of the 'Secretary of State in Council by virtue of that Act' that no action could be taken without a concurrence of a majority of votes at a meeting of the Council. In all other cases, if a difference of opinion arose at any meeting of the Council at which the Secretary of State was present, on any question other than that of the election of a Member of the Council, the determination of the Secretary of State was to be final. When this difference of opinion arose on a question decided at any meet-

ing, the Secretary of State, or any Member of the Council present, might require his opinion and the reasons for the same to be entered in the Minutes of the proceedings. It is noticeable that, in the case of a Member, the reasons must be such as 'he may have stated at the 'meeting.' Provision is made for urgency and for the independent action of the Secretary of State, subject to the requirement that the urgent reasons for sending a communication are recorded by the Secretary of State, and notice thereof given to every Member of the Council. Despatches might also be marked 'Secret' by the authorities sending them, and they need not be communicated to the Members of the Council unless the Secretary of State should so think fit and direct.

It is obvious that, both in the Act of 1858 and in the Indian Councils Act of 1861, the policy of Parliament was to accord to the Executive Government an almost unexampled measure of despotic power to meet cases of emergency, the importance of which could only imperfectly be appreciated by unskilled persons, or by any persons at a vast distance from the scene of action. The policy was, on the other hand, to provide an equally unexampled series of checks and compensatory influences for the purpose of controlling the independent action of the Executive in all ordinary times. A double machinery of Councillors, laborious provision for freedom of deliberation and for publicity in recording the results of it, together with every imaginable security for the personal independence of the Councillors, were contrivances by which Parliament sought to recognise the undoubted Prerogative of the Crown while reconciling it with its own ultimate right of determining how British dominions should be governed.

Mr. John Stuart Mill, who had a lifetime's experience in Indian affairs, said that 'the great constitutional security for the good government of India lies 'in the forms of business.' It may be doubted whether, in spite of the anxious care which Parliament has taken to regulate the forms of Indian business, the constitutional security sought for has really been attained. When, on the 14th of March, 1878, the Indian vernacular press was subjected, in reference to the expression of opinion, to an inquisitorial and despotic control, such as only the immediate dread of revolution could justify, and which was alien to every British institution, tradition, and principle, the Act was passed formally indeed by the Governor-General in Council, but with the determined and reasoned opposition of some of the most eminent members of that Council. The whole diplomatic change of front towards Afghanistan in 1877–78, the ultimatum addressed to Shere Ali, and the concentration of troops on the Afghan frontier, comprise a series of momentous acts which were preceded by the smallest possible amount of public deliberation either at home or in India, were stoutly opposed at every point by the most experienced members, civil and military, of the two Indian Councils; and were, in fact, almost undisguisedly perpetrated on the sole responsibility of the Secretary of State for India and the Viceroy. The same inefficiency of the existing constitutional guarantees in India was almost more glaringly manifested when, in March 1879, Lord Lytton, the Viceroy, by a mere Executive act, and against the opinion of a majority of his Council, exempted from import-duty all the inferior sorts of cotton, to the sudden and serious embarrassment of the struggling manufacturers of India, and to the

loss of a revenue of 200,000*l.* per annum. Mr. Whitley Stokes, the Legislative Member of Council, in his Minute of remonstrance, dated Calcutta, March 13, 1879, wrote of the Act of exemption, when first proposed, as follows:—'The power to exempt goods from 'Customs duties was originally conferred by Act xviii. 'of 1870, and was merely intended to relieve the Ex- 'ecutive from the useless and troublesome formality of 'coming from time to time to the Indian Legislature 'to make in the tariff petty alterations which that 'Legislature, if applied to, would have made at once. 'The change now proposed is of a very different charac- 'ter. I have reason to think that it would never be 'sanctioned by the Legislative Council, unless, indeed, 'arguments were brought forward in its favour far more 'cogent than those I have heard. The proposed exemp- 'tion of cotton goods, if made by a mere executive 'order, will thus resemble what lawyers call a fraud on 'the power; and there is unfortunately no Court of 'Equity to relieve the people of India against it.'

It was another effort on the part of Parliament to retain in its own hands a large share of the direct government of India when, by section 53 of the Act of 1858, the Secretary of State in Council was required, within the first fourteen days during which Parliament might be sitting next after the first day in May in every year, to lay before both Houses of Parliament an account of the receipts and disbursements at home and abroad on account of the Government of India, for the financial year preceding that last completed; and also estimates for the coming year, and a statement of debts, salaries, and allowances. The account was to be accompanied 'by a statement prepared from detailed reports from

'each Presidency and District in India, in such form as 'should best exhibit the moral and material progress 'and condition of India in each such Presidency.' The value of these, and indeed of all other like Parliamentary requirements, must mainly depend upon the assiduity and vigilance of Parliament itself. Up to very recently, when appalling famines and financial embarrassments, necessitating large public loans from England, at last aroused public attention in the two Houses and in the country at large, there was no topic more certain to fall flat on the ears of the British Legislature than that of the Indian Budget or Indian affairs generally.

It has already been seen that the further Parliamentary requirement, contained in section 54 of the Act of 1858, relating to the communication to both Houses of Parliament, within a definite time, of any order sent to India directing the actual commencement of hostilities by Her Majesty's forces in India, was proved in the Afghan war of 1878–79 to be without any avail for the purpose of securing Parliamentary discussion or concurrence. By the time that Parliament was formally acquainted with the fact of the order being sent for the commencement of hostilities, political and diplomatic steps of a most decisive character had long been taken which seemed to render retreat or pause almost impossible. The obvious course for Ministers was to defend all that had been done as being dictated by an over-bearing necessity, and to rely on a loyal Parliamentary majority to grant them condonation and indemnity.

The later amendments of the Act of 1858 have rather been in the direction of extending the Prerogative of the Crown than of supplying fresh safe-guards against its abuse, or fortifying the controlling influence

of Parliament. The Act of 1865 (24 and 25 Victoria, cap. 67) enlarges the legislative functions of the Governor-General in Council so as to enable him 'to 'make laws and regulations for all British subjects of 'Her Majesty within the dominions of Princes and 'States in India in alliance with Her Majesty, whether 'in the service of the Government of India or other-'wise.' By the Act of 1869 (32 and 33 Victoria, cap. 98) the legislative power of the Governor-General in Council has been similarly extended so as to reach to native Indian subjects of Her Majesty 'without and 'beyond as well as within the Indian territories under 'the dominion of Her Majesty.' An Act of the same year (32 and 33 Victoria, cap. 97) went some way towards impairing the securities for independence on the part of the Council of India which had been carefully devised by the Act of 1858. Henceforth all vacancies were to be filled up by appointment of the Secretary of State. Members of the Council could only be appointed for the term of ten years, and, generally, were not re-eligible. But by the third section of the Act the Secretary of State was enabled 'to re-appoint for a further 'period of five years any person whose term of office 'should have expired, provided such re-appointment be 'made for special reasons of public advantage, such 'reasons to be set forth in a Minute signed by the said 'Secretary of State, and laid before both Houses of 'Parliament.'

The transfer of the government of India from the Company to the Crown had, no doubt, the effect of abolishing the anomalous tripartite government of India by the Governor-General in Council in India, the Court of Directors in Leadenhall Street, and the Board of

Control in Downing Street, and of substituting for it a better consolidated system of government and one more worthy of the dignity of both England and India. Parliament also was certainly in a better position than heretofore for exercising over the current administration of Indian affairs a scrutinising and incessant control of the most direct kind. But it may still be doubted whether, in practice, since the transfer, such a control has been exercised at all to the extent which would suffice to compensate for the loss of all the special ability and experience which was represented in the Court of Directors, and for the keen and vigilant interest of a personal kind which imparted an unfailing zeal to the Court of Proprietors. Any way, it has been scarcely possible for Parliament to take up towards the Crown and its Ministers the sort of chronic and healthful attitude of adversative and wary suspiciousness which, in relation to a private Company, was at once both imperative and decorous. The following language of the 51st section of the Act of 1833, by which Parliament resolutely guards itself against having its plenary rights of government in the minutest degree impaired through the simultaneous existence of a co-ordinate authority, could hardly find place in an Act passed since 1858, when the dependence on Parliament of the Executive Government to which the government of India had been transferred was formally assumed; and statutory precautions could not be taken against abuses without confounding the customary relations of Parliament and the Crown, and introducing a constitutional solecism. The language of the 51st section alluded to is as follows: 'Nothing herein contained shall 'extend to affect in any way the right of Parliament to

'make laws for the said territories, and for all the inhabitants thereof; and it is expressly declared that a 'full, complete, and constantly existing right and power 'is intended to be reserved to Parliament to control, 'supersede, or prevent all proceedings and acts whatsoever of the said Governor-General in Council, and to 'repeal and alter at any time any law or regulation 'whatsoever made by the said Governor-General in 'Council, and in all respects to legislate for the said 'territories and all the inhabitants thereof in as full 'and ample a manner as if this Act had not been 'passed; and the better to enable Parliament to exercise at all times such right and power, all laws 'and regulations made by the said Governor-General in 'Council shall be transmitted to England, and laid 'before both Houses of Parliament, in the same manner 'as is now provided concerning the rules and regulations made by the several Governments of India.'

(ii.) The settlement or the annexation of the territories of British Columbia, the Fiji Islands, and the Transvaal in South Africa, affords instances of the sort of amicable co-operation by which Parliament and the Crown, while insisting on their respective rights and privileges and guarding against mutual encroachments, may yet combine towards the accomplishment of ends generally recognised as expedient and beneficent.

Owing to the large discoveries of gold which were made in 1858 in a portion of the Hudson's Bay territory, and a vast immigration of gold-diggers which resulted, it became necessary for the British Government to take measures for the protection of life and property and the maintenance of order. So far, the prerogative of the Crown was exerted; and the Secretary of State for

the Colonies—then Sir Edward Bulwer Lytton—bestowed earnest attention upon the task of organising the new settlement as a British colony. The process was completed by an Act of Parliament (21 and 22 Vict., cap. 99). Vancouver's Island was added to British Columbia in 1866, and both were incorporated with the Dominion of Canada in 1871, upon the petition of the inhabitants.

The Fiji Islands were annexed in the year 1874. As far back as the year 1859 the reigning monarch, Thakombau, had, with consent of the leading chiefs, made his first offer of the sovereignty of those islands to the Crown of England; which offer the Government of that day declined to accept. For several years previous to the year 1874, a form of government existed in Fiji which had been initiated and mainly carried on by the white settlers, principally for their own protection. A state of anarchy, however, succeeded. The settlers refused any longer to recognise the Government, or to be further taxed for its support; and threw themselves on the protection of the foreign consuls. The islands were again offered to Great Britain, with a debt of some 82,000*l.*, contracted by the Government during the last two years. On the 17th July, 1874, Lord Carnarvon, Secretary of State for the Colonies, called attention to the subject in the House of Lords. He stated that, in 1872, Lord Kimberley had appointed two Commissioners to proceed to the Fiji Islands, in consequence of the appeal made to England and to other civilised countries, to take them under protection; and that, the report of the Commissioners being now presented, it became necessary to deal with the matter, and to decide whether, with the consent of the natives,

to accept the position, or not. The Government in the meantime instructed Sir Hercules Robinson to proceed to the islands and ascertain the disposition of the population. On the 4th of August the House of Commons agreed to a motion of Mr. McArthur's: 'That this 'House is gratified to learn that Her Majesty's Govern-'ment have yielded to the unanimous request of the 'chiefs, native population, and white residents of Fiji, 'for annexation to this country, so far as to direct Sir 'Hercules Robinson to proceed to those islands, with a 'view to the accomplishment of that object.' Shortly afterwards the annexation was effected, through the exercise of the prerogative of the Crown.

Thus, both in the case of British Columbia and in that of the Fiji Islands, while the prerogative of the Crown for the formal act of annexing territory and establishing a Government in unsettled territory was never disputed, yet Parliament maintained its right to be consulted, to interpose, and to modify or prohibit the arrangements if expedient, or to share with the Crown in carrying them out to a satisfactory termination. These remarks are important especially in reference to the case of the annexation of the Transvaal, in which Parliament had very little share, and the policy of which, if exposed to the scrutiny of Parliament, would possibly have given rise to so heated a debate, and such a variety of opinions, as to render any action at all extremely difficult.

The grounds for annexing the Transvaal seem to have been that the prevalent anarchy was injurious to the orderly government of the colony of Natal, and that the habitual treatment of the native tribes on the frontier by the Dutch inhabitants of the Transvaal was

so reckless and inhuman as to render those tribes a growing source of danger to the colony. The following description of the state of things in the Transvaal, as given in the despatches of Sir T. Shepstone, the British Commissioner, is relevant to the present enquiry, as showing the sort of grounds which the Government believed would commend themselves to Parliament as sufficient and satisfactory reasons for annexing foreign territory by the act of the Prerogative.

On March the 6th, 1877, Sir T. Shepstone writes: 'It was patent to every observer that the Government 'was powerless to control either its white citizens or its 'native subjects; that it was incapable of enforcing its 'laws, or of collecting its taxes; that the Treasury was 'empty; that the salaries of officials had been and are 'months in arrear; that sums payable for the ordinary 'and necessary expenditure of Government cannot be 'had; and that such services as postal contracts were 'long and hopelessly over-due; that the white inhabi-'tants had become split into factions, that the large 'native populations within the boundaries of the State 'ignore its authority and laws, and that the powerful 'Zulu King, Cetewayo, is anxious to seize upon the first 'opportunity of attacking a country, the conduct of 'whose warriors has convinced him that it can be easily 'conquered by his clamouring regiments.' On the 12th of March Sir T. Shepstone writes: 'I think it necessary 'to explain, more at length than I was able to do in 'my last despatch, the circumstances which seem to me 'to forbid all hope that the Transvaal Republic is 'capable of maintaining the show even of independent 'existence any longer, which induced me to consider it 'my duty to assume this position in my communica-

'tions with the President and Executive Council, and 'which have convinced me that if I were to leave the 'country in its present condition, I should but expose 'the white inhabitants to anarchy among themselves, 'and to attack from the natives, that would prove not 'only fatal to the republic, but in the highest degree 'dangerous to Her Majesty's possessions and subjects in 'South Africa.'

On the 12th of April the Transvaal Republic was formally annexed to the British Dominions, a proclamation being issued by Sir T. Shepstone, who thereupon assumed office as Administrator. The above despatches of Sir T. Shepstone were presented to Parliament, and the subject was discussed more than once in the House of Commons, as, for instance, on the 24th of July, when an exciting debate took place in consequence of a small knot of Irish members determining to obstruct all progress, among whom Mr. Parnell declared his intention of opposing the measure in every way open to him.

It is observable that the grounds for annexing the Transvaal were much the same as those which had been repeatedly alleged for attaching new provinces, such as the Punjaub and Oude, to the British Dominions in India, —namely, the prevalent anarchy, and the consequent peril to the British frontier. The policy of annexation, thus conceived, has evidently no assignable limit, and the logical consummation of it is exhibited in the deliberate recommendation, in the early part of 1879, of Sir Bartle Frere, High Commissioner for South Africa, to the effect that the British Government should administer, if not occupy and annex, the whole of the territories now inhabited by tribes on the British fron-

tier, up to some indefinite line of demarcation in the interior of Africa. The Emperor Augustus acutely foresaw that a policy of indefinitely extending the frontiers of the Roman Empire must end in the Empire falling to pieces through its own weight and unwieldy massiveness, and he is said to have assigned the boundaries beyond which the limits of the Empire ought not to be enlarged by his successors. Exactly the same class of dangers must await the indefinite extension of the British Dominions; and there will arise an ever increasing necessity for Parliament to watch with scrupulous vigilance the exercise of the Prerogative of the Crown in this respect, and not to allow itself to lose its composure and balance of judgment either through deference to some authoritative personage, for a moment influential or overbearing, or through being itself infected with a lust of empire untempered by any sense of the responsibility which each fresh annexation to an increasing extent brings with it.

The disposition to aggrandise the British name and dominions by a profitless extension of territory in a way wholly distinct from, and, in some most important points, contrasted with, that of progressive and cautious colonisation, marks a certain vulgarisation and degradation of national sentiment which has recently been not inaptly, in view of notorious European precedents, stigmatised as 'Imperialism.' There is, no doubt, much that is vague and of uncertain significance in this appellation. The disposition indicated is, however, sufficiently marked by describing it as the preference of show for reality, the readiness to seek in force a substitute for moral and political agencies, an indifference to national landmarks, and a want of concern for

the imposition of burdensome taxation at home compared with the allurements of a dazzling exhibition of British ascendency in various and remote parts of the earth.

The late Professor F. D. Maurice, in one of his Lectures on 'Social Morality,'[1] describes with unerring precision the opposition between the National and the Imperialistic conceptions of political life, and traces the steps by which the Roman Nation, which was built upon Right and Duty, degenerated into the Empire, which was based upon Force. He says: 'I approach the sub-'ject which all feel to be most important in speaking 'of the Empire. Its name, its origin, its continuance, 'all point to the function of the soldier. He had been 'the defender of a Nation; wherever he had gone forth 'in wars of conquest, it was still to spread and glorify 'the national name. His discipline exhibited the sub-'mission of animal force to a commanding word, his 'courage the personal valour which is called forth in 'those who feel themselves bound by a common 'interest, united in a common cause. He had been 'taught in the civil wars—specially by the great dar-'ling of the Legions—that he had in his hands the 'weapons which could break down national barriers, 'which could make him supreme. The lesson was 'formularised by the Empire. The General was the 'chief not of a Nation, but of a World. The Army was 'a world power; all relics of national existence could 'not but look very paltry in its eyes. Yet they 'had a charm for it. The old oath, the traditional 'respect for law, could survive great shocks. The 'Jurisconsults, whilst they saw the terrible force of the

[1] Lecture XIII., on 'The Universal Empire.'

'legions, did not despair of binding them with some of 'the withs and cords which in violent moments they 'had often rent asunder. But restraints upon the 'army were in fact restraints upon the Empire. And 'it soon began to be evident that the collision of these 'forces—the rising of the servants against the Master, 'their choice of some rival Master—would show what 'the blessing of an Empire is.'

Such is the language of the moral philosopher, and of one who was (if any man ever was) a religious prophet. But an identical testimony is rendered by one who is not only an experienced statesman, but one of the most successful Colonial administrators of modern times. Lord Carnarvon, in the course of an address on 'Imperial Administration,' delivered on November 5th, 1878, before the Edinburgh Philosophical Institution, aptly described both the true and the false side of what is called 'Imperialism' in the following language:—

'We can best tell what Imperialism is by ascertain-'ing what it is not; and I apprehend on that point there 'will be very little difference of opinion amongst us. 'It is certainly not Cæsarism. It is not that base 'second-hand copy of Continental despotisms, that bas-'tard monarchy begotten in the slime of political and 'financial corruption. It has nothing to do with that. 'Despotisms, Mr. Burke has said, change their furni-'ture and their fashions, but the evil principle prevails 'and reappears in every generation. They dazzle, 'indeed, by enlisting false teachers, and by arraying 'themselves in false colours; but, after all, they are 'hateful from top to bottom. They are utterly false; 'the benefits that they confer are short-lived, and they

'poison the very fount from which their own waters 'spring. Therefore we are clear on this point, that 'true Imperialism has nothing to do with this. Nor has 'it to do with what has been called personal govern-'ment. Our Constitution is clear enough on this point. 'We know that the Crown has certain prerogatives; 'we know that Parliament has certain rights and duties; 'but neither Parliament nor the Crown may act alone. 'They must act in reference to each other, and their 'combined action is that which the Constitution con-'templates and desires. True Imperialism is not that. 'Nor is it again, I am sure we shall agree, mere bulk 'of territory and multiplication of subjects. I hear 'sometimes the words, "A great England and a little '"England;" but we do not measure nations by 'their size or by their numbers, any more than we 'measure men by their inches. If we did, China 'would be the model of our admiration; and the hosts 'of Xerxes, and not the handful of Athenian citizens, 'would be the people we should reverence in the past 'history of the world. No! What we do look for is 'not the bulk of territory, but the class of men that 'are bred up and produced, and the qualities which 'those men have; and putting aside the highest of all, 'we may say this, that steadfastness of purpose, sim-'plicity of character, truth, and the preference of that 'which is solid and substantial for that which is merely 'glittering and deceptive, have been the characteris-'tics of Englishmen in past generations. Well, then, 'if it is none of all these, what is it, if indeed it has a 'meaning? I should say it is, first of all, to recognise, 'as I think my right hon. friend the Chancellor of the 'Exchequer very fairly said the other day—to recog-

'nise that there are duties which we owe beyond the 'limits of these four seas; and, secondly, to breathe 'into the whole of that mighty mass I have described, 'a common spirit of unity—to find for it that which 'would be the nearest approach to the patriotism that 'you look for in an individual. But then you may 'say to me, what is patriotism?—and here again I am afraid I may say that the term, like Imperialism, has 'varied greatly. Like the word liberty, it has often 'been abused. There is a true patriotism and a false 'one. Horace Walpole, I think it was, says in one of 'his letters that at one time there was no declaration a 'public man could make that was more popular on the 'hustings than that he neither was nor had been nor 'would be a patriot; and we all know Mr. Canning's 'definition of a patriot—a man who was the friend of 'every country except his own. Well, a true patriot 'is neither of these. Nor is patriotism to be found in 'the nation, again, which, so to speak, swaggers down 'the High Street of the world with its hat cocked, and 'on the look-out for some fancied insult or affront. I 'will only say that you might find for such a character 'in public a counterpart in private life; but I think 'we should all agree that in private life he was a very 'disputative, quarrelsome, disagreeable companion. 'No, ladies and gentlemen, I believe that patriotism 'and imperialism both, if they are to be true, must rest 'upon the one sole foundation on which all true things 'can rest—that which is sound and moral. You cannot 'divorce your system of politics from your system of 'morals. There are not two sides to that shield; there 'are not two codes to be observed. I have seen it of 'late more or less denied. I was reading but a few

'days since, in a periodical that enjoys deservedly a 'great circulation and reputation—I read to my amaze-'ment the remark about a by-gone character of the 'middle ages, that he could not be a statesman because 'he paid obedience to the laws of morality. I utterly 'abhor and repudiate and detest such a doctrine as 'that. I believe there is no safety for a nation the 'moment that she departs from those eternal principles 'of right and wrong, which in our case have carried 'us through storm, and trial, and tribulation in past 'times.'

It has been a good deal disputed whether the Crown has any right by its Prerogative of disposing of the national territory in time of peace, whether by way of gift, exchange, or sale. In the year 1862 Lord Palmerston's Government agreed to hand over all the Ionian Islands to the new kingdom of Greece, if the Greeks would choose a king approved by England, which they accordingly did. The neutrality of the Islands was to be declared by the Great Powers, and the fortifications of Corfu demolished; both of which conditions were observed. The subject of the relinquishment of the Protectorate of these Islands was debated in the House of Commons in February 1863, and Lord Palmerston was asked whether it was competent, according to the Constitution, for the Crown to alienate them without the consent of Parliament. His Lordship answered that the Republic of the Seven Islands was, by the Treaty of 1815, placed under the Protectorate of the British Crown. He said that the distinction was manifest and radical, and added: 'But 'with regard to cases of territory acquired by conquest 'during war, and not ceded by Treaty, and which are

'not therefore British freehold, and all possessions that 'have been ceded by Treaty and held as possessions 'of the British Crown, there is no question that the 'Crown may make a Treaty alienating such possessions 'of the British Crown without the consent of the House 'of Commons.' He then instanced the cases of Senegal, Minorca, Florida, and the Island of Banca, which were 'all 'of them for a greater or less period of time possessions 'of the British Crown; and they were all ceded by treaty 'to some foreign power; therefore there cannot be a ques- 'tion as to the competency of the Crown to make such 'cessions.'[1] Mr. Forsyth, however, commenting on this statement, observes that all these cases of cession were made by treaty of peace at the close of a war; and they do not touch the question whether the Crown has the power where there has been no war, and consequently no treaty of peace. Mr. Forsyth cites the case of the abandonment of the Orange River sovereignty in 1854, by the Queen's Letters Patent revoking previous Letters Patent of 1851, and by force of a proclamation whereby Her Majesty 'did declare 'and make known the abandonment and renunciation 'of our dominion and sovereignty over the said terri- 'tory and the inhabitants thereof.' One main difficulty in cases of cession relates to the allegiance of the inhabitants of the ceded territory. In the course of the negotiations for the cession of the Orange River Territory in 1854 the Duke of Newcastle, then Colonial Secretary, wrote to the Governor of the Cape as follows: 'With respect to the allegiance of the inhabitants who 'may have been born in British dominions either

[1] *Hansard*, vol. clix. 230, 231.

'within or without the sovereignty, there is, I believe, 'little doubt that no measure resting on the Queen's 'Prerogative only for its authority, could release them 'from the tie of such negative allegiance. An Act of 'Parliament would be required for such a purpose.'[1]

(iii.) The position of the Governor of a Crown Colony, in reference both to the Colony and to the Crown whose agent he is, can be understood from the following passage in a speech delivered by Sir Arthur Gordon, Governor of Fiji, in Aberdeen on November 15th, 1878. He said: 'The Governor of a Crown Colony not only 'reigns but governs in the strictest sense. All sub-'ordinate officers act in accordance with his directions. 'He is responsible for their shortcomings if he fails to 'correct them. They are liable to suspension at his 'will. The Legislature is so constructed as to enable 'him to secure, should he deem it necessary, the pas-'sage of any enactment he may frame. He is in the 'Colony the ultimate referee on almost every con-'ceivable subject of administration or legislation. He 'is called on to consider a multiplicity of questions, 'great and small, having no relation to one another, 'and the strain upon the mind of keeping all of which 'before it must be felt to be appreciated. Indepen-'dently of the greater objects which daily occupy him, 'he is constantly required to form opinions and give 'decisions upon a hundred topics. He is never free 'from harness, he cannot delegate his functions to 'another, his work is not limited by any office hours. 'It is evident that where such powers are committed 'and such duties imposed great responsibilities are

[1] Forsyth's *Cases and Opinions*, p. 184.

'incurred, and that to discharge them efficiently is no 'light task. In all Crown Colonies there exist (and it 'is the reason for the maintenance of so peculiar a form 'of constitution) two or more different races, to neither 'of which can safely be entrusted the charge of govern- 'ing the other, and the existence of which is the cause 'of the establishment of what is in fact a species of 'despotism, modified by a power of appeal to the 'Imperial Government at home, and by the action of 'public opinion and common sense upon the mere legal 'rights of the post. The first qualification, therefore, 'that the Governor of such a Colony should possess is 'the power of entering alike into the views, modes of 'thought, and objects of interest of other races than 'his own. And next, a judicial impartiality in the 'power of applying that knowledge as between them 'where their interests are or seem to be at variance. 'He should possess a knowledge of the relations under 'which in past times men of one race have held 'sway over those of another, or those of different races 'have lived together under one Government—relations 'the history of which may in almost every case serve as a 'guide, either by way of warning or example. He 'should be imbued with the legislative spirit. I do 'not mean to say that he should be the slave of for- 'malised law in the strict shape in which it is best 'known to him at home, or that he should be anxiously 'eager to apply all the technicalities of the English 'law, in an indiscriminate manner, among those un- 'acquainted with it; but he should be penetrated by 'the spirit of law, and able to clothe that spirit with 'the various shapes which may best suit a rude and 'uncivilised people, or least chafe the sensitiveness of

'peculiar forms of ancient civilisation, and least interfere with such good elements as may be found to exist in such ancient civilisation. I entirely concur in the sentiments expressed by Lord Carnarvon with regard to the ability, industry, and singleness of purpose which is shown by the higher permanent officials of the Colonial Department; but it is no doubt the case that economy of administration, and an avoidance of all questions likely to lead to Parliamentary discussions, are eagerly desired by the Imperial Government. It is natural that it should be so, nay, more, it is right it should be so; but a knowledge of this fact may, in such a case as I have supposed, sometimes deter from making applications for even necessary expenditure, and occasion some reluctance freely to state unsatisfactory truths. Or a man, who has, perhaps, served long and well in other parts of the world, may be inclined to look on the appointment he has received as a reward for past service, and desire indolently to enjoy its fruits. He may do so with little fear of external rebuke, and, perhaps, without self-reproach, but he then cannot help permitting power to pass from his own hands into those of some local potentate. He has to shut his eyes to acts of petty jobbery, and does not care to rouse himself to perceive the need for measures of reform. He not only takes pains to avoid running counter to the passions or prejudices of influential classes—for that every prudent man would do—but fears even to touch abuses profitable to those whose hostility, if roused, could make his life uncomfortable, and destroy the peace and ease he covets.'

The problems before a Secretary of State for the

Colonies are thus, in respect of the Crown Colonies, co-extensive with the whole field of politics. In respect of the Colonies having Constitutions granted them by Parliament he has less despotic functions, indeed, to perform, but those which he has are of the highest importance and involve the loftiest sort of responsibility. He has not only the often arduous task of advising the Crown with respect to assenting to the Acts of Colonial Legislatures, and for that purpose determining which of those Acts relate to the Colony only, and which extend in their effects to the British dominions generally, but also of providing for the defence of the Colonies, and from time to time assisting Governors and Legislatures, or their delegates occasionally sent to this country, with counsel or help in and outside of the British Parliament. Little more need be said in proof of the crowd of delicate questions which press on the attention of a Colonial Secretary, and which call for proportionate attention of Parliament in checking the exercise of the Royal Prerogative, than is implied in merely adverting to some of the pending questions waiting for the intervention of the Colonial Secretary in the early part of the year 1879. Besides the long-standing dispute between the two Houses of the Legislature in Victoria, a question had arisen whether Sir Bryan O'Loghlen, M.P. for County Clare, had or had not vacated his seat, under the statute of Anne, through having accepted the office of Attorney-General of Victoria, which was alleged to be a place of profit under the Crown. The question turned upon the extent to which, for the purposes of the Statute, the Governor of the Colony, who presented to the office, personated the Crown. The matter was finally referred

to a Select Committee of the House of Commons, and, by a Resolution of the House, the seat was declared to be vacated. The general importance of the case is mainly due to the character with which the decision seems to vest the Governor of a constitutionally governed Colony.

A still more perplexing case engaged the attention of the Colonial Secretary about the same time in Canada. The Lieutenant-Governor of Quebec, Mr. Letellier de St. Just, had dismissed his Ministers on the ground of an absence of cordial relations between himself and them, although they had a large majority in a small House. Thereupon the Government in the Dominion Parliament, led by Sir John Macdonald, advised the Governor-General, the Marquis of Lorne, to dismiss from his office the Lieutenant-Governor of Quebec, in pursuance of a vote of censure carried by a large majority in the Dominion Parliament. It had happened, indeed, that the general election for Quebec had made it appear that the verdict of the people was in favour of the Lieutenant-Governor's action. As a matter of law, it was clearly open to Lord Lorne to dismiss the Lieutenant-Governor in accordance with the advice of his Ministers. But this he refused to do without first consulting the Home authorities. This course has been severely denounced in the Colony, or at least in some parts of the Colony. It is alleged to be an infringement of the constitutional rights of the Dominion, and an opinion is said to prevail, though to be by no means universal, that the British Government had no more right to touch the question than to revise the Canadian tariff.

The proper sensitiveness of constitutionally-governed

Colonies with respect to the functions of the Governor is further illustrated by a question simultaneously raised in Natal in respect of an apprehended intrusion upon that Colony of the authority of the Governor of the Cape of Good Hope. In a Memorial addressed to the Queen, the colonists expressed themselves as follows[1]:—

'The pride which the colonists of Natal feel in their 'independence—an independence which, we most confi- 'dently affirm, has been nobly used and never abused— 'is one of the interests to be reconciled in discussing 'the possibility of union with the other States and 'Colonies of South Africa, and it was no doubt in re- 'cognition of this fact that promises have been repeat- 'edly made, both by your Majesty's Secretary of State 'and your Majesty's High Commissioner, that no steps 'should be taken towards confederation except with the 'full consent of the Legislature of this colony, delibera- 'ting under the shelter of your Majesty's gracious 'charter of political rights. It is, therefore, with sur- 'prise, regret, and apprehension, that we notice that, 'in accordance with the terms of a despatch addressed 'to the Lieutenant-Governor of Natal by your Majesty's 'Secretary of State for the Colonies, and dated the 21st 'September last, all questions, except those affecting 'the mere internal affairs of this colony, are to be 'referred, not, as heretofore, to your Majesty's Secretary 'of State, but to the Governor of the Cape of Good 'Hope. We are anxious beyond all things to put the 'best construction on the acts of your Majesty's Go- 'vernment, which has shown so much interest in South 'African affairs. We cannot, however, when we com-

[1] See *Daily News*, May 7, 1879.

'pare this despatch with a despatch of similar tenor
'and of the same date addressed to the administrator of
'your Majesty's Government in the Transvaal, entertain
'any doubt that by these directions it is intended to
'bring about a Confederation of the South African
'States already under the British flag, without consult-
'ing the independent Legislature of this colony. The
'instructions in the despatches referred to virtually
'constitute the Governor of the Cape of Good Hope
'Governor-General of South Africa, and as yet no law
'has been passed by the Legislature of this colony
'recognising the existence of any such authority, nor
'has the charter so graciously granted to us by your
'Majesty been either altered or revoked. We most
'respectfully yet firmly protest against this course as
'being not only a violation of the spirit and intention
'of your Majesty's gracious charter, and of promises
'repeatedly made to us in your Majesty's name, but as
'also being a measure calculated to defeat the very end
'it has in view, and to create irritation and disunion
'where, as we must presume, the object aimed at is
'unity and tranquillity. And while we thus speak for
'ourselves we must express our grave fears as to the
'effect which the publication of these despatches will
'exercise upon the Dutch population in the Transvaal.
'We therefore most respectfully and earnestly beg that
'this decision on the part of your Majesty's Government
'may be reconsidered, and your Majesty's loyal subjects
'allowed the full benefit of the provision of your Ma-
'jesty's most gracious charter.'

CHAPTER IV.

LIBERTY OF THE SUBJECT.

THERE is no expression which is more familiar in the popular mouth, when adverting to the characteristics of the English Constitution, than that of 'the liberty of the subject.' In fact, to a large class of persons who have little taste for the somewhat technical arrangements which determine the relations to each other of the Crown and the Houses of Parliament, the expression 'liberty of the subject' carries with it most of what they understand by and value in the Constitution under which they live. It is less to the establishment of the supremacy of Parliament at the Revolution, or to the slow ascending steps by which in the reigns of the Edwards the House of Commons climbed to its ascendency in the State, than to recollections,—confused indeed, and generally most erroneous,—of certain clauses in Magna Charta, of the general bearing of the Habeas Corpus Act, and of portions of the Bill of Rights and of the Act of Settlement, to which the popular imagination turns, when vindicating the incomparable claims of the English Constitution. If any one would turn to the written Constitutions of every one of the American States, he would find the doctrines appertaining to the liberty of the subject, as they are scattered up and down such notable monuments as those above alluded to, clearly codified, and forming a sub-

stantial, if not a preponderant, portion of the rights guaranteed by the State to all its citizens.

The public instinct is not mistaken in thus discerning what is that mark of the English Constitution which most decisively separates it from all known Constitutions other than those to which itself has given birth. It is not necessary to recur to the obsolete and often misinterpreted language of documents now rather of an antiquarian than of a practical interest. The liberty of the subject, when properly understood, is an independent principle in the Constitution, and lies far deeper than any temporary expression of it, however determined and magniloquent. There is a limit not only to the rights of the Executive, but even to the rights of the Legislature itself, when the exercise of either class of rights threatens to encroach on the independence guaranteed by the Constitution to every citizen. Where these limits are placed, and how far they may be shifted, or have been shifted, without losing the distinctness of their character, are questions arduous indeed, but not more arduous than multitudes of other questions which are instantly originated when it is sought, in constitutional matters, to substitute a mathematical exactness for moral certainty.

Not, indeed, that the Liberty of the Subject is simply an indefinite claim to resist legislative or executive encroachments; since the Courts of Law, in their interpretation of Statutes and their announcement of the principles of the Common Law, have, as respects the Executive at least, seldom had much hesitation in determining how far it can trespass on individual freedom. In the case of the Legislature, the limits are incapable of being fixed by any legal standard; and it

is here, more than anywhere else, that the subtlest dangers to popular liberty sometimes lie concealed. This remark has a special pertinence in reference to the period which has elapsed since the passing of the first Reform Bill. The notion that individual freedom needed protection against the Crown and its officers, and even against an aristocratically-constituted Legislature, had long been fixed in the popular mind, and had been fortified by burning memories of victories won in Courts of Justice and often in fields of a more irregular warfare. But it was not unnatural to believe that, so soon as the people became adequately represented in Parliament, and indeed promised to attain an authority paramount over all privileged classes as well as over the highly organised engines of government, all fear of encroachments on private liberty, over and above such as might be called for in the strict and intelligently-interpreted interests of the whole community, might be dispensed with. The House of Commons was, henceforth, it might have been believed, an assembly mainly composed of popular tribunes,—sensitive even to captiousness of the minutest novel invasion of popular freedom, whether threatened through the medium of the police, the construction and administration of the criminal law, the requirements of the army and navy, or the claims of novel scientific theories for arresting disease and promoting general well-being.

If such anticipations were entertained, they have not been fulfilled. It has rather been proved,—in accordance with well-known precedents in other times and countries,—that legislative assemblies are not the less despotic for being democratised. They are tempted,

indeed, to be more despotic. They are ostentatiously the organs of the popular opinion and voice; and when they invent chains for their constituents, it is their natural and ready defence that their constituents are willingly and gladly fettering themselves. The parade of free and public discussion, the cautious procedure of Select Committees of Inquiry (however constituted), the total absence of secrecy,—so soon, at least, as any attempt at secrecy has been detected,—and the concurrent opportunities for discussion in the public newspapers, all give a plausibility to legislative measures introducing any amount whatever of restraint on private freedom, in the face of which bare abstract dogmas borrowed from the mouldy relics of another age are impotent to make a stand.

It has usually happened, indeed, during the last few years, that the defence of the so-called 'liberty of the subject' in the Houses of Parliament has fallen into the hands of a very limited group of Members, who, except in the cases where they have on other grounds been individually respected, have rather seemed possessed by a fanaticism, or at the best an ignorant whim. It is no doubt true that the progress of modern science, especially in the sanitary department, has laid open many fields for the advance of the province of government to which former times could present no parallel. It is also true that the greatest possible benefit to public health, and to the classes of society least able to protect themselves, has been accomplished, and will yet be accomplished, by imposing on a refractory minority sanitary restraints and conditions imperatively demanded in the interests of all, majority and minority alike. In a former part of this treatise it has been seen that one

main function of Parliament in recent times has been that of constituting small subordinate legislatures, such as Boards of Health and Local Boards, in close and constant communication with the central Executive Government. The constitutional propriety of such legislation has never been doubted, though the nature and limits of the general policy may be at any time matter of fresh political criticism. The only point to be noticed here is, that there is a limit beyond which no measure which contemplates aggression on the independence of private persons must proceed, whatever the public interests involved. The 'public,' as a whole, is constituted out of an assemblage of private persons; and just as there are modes of torture and injurious treatment of individual persons which no public end can justify, so, for ends which are valuable in themselves, there are some kinds of intrusion on private rights which would constitute a far greater public evil than the failure to attain those ends. It was thus that Coleridge distinguished between a person and a thing, in that a person alone was an end in himself.

Side by side with the really important and well-considered schemes of scientific men for bringing to bear on the mass of the population the product of scientific researches, there have been of late years flying about in all directions all sorts of crude legislative propositions calculated to attain, after a fashion, one sort of beneficial end, but certain to carry with them in their train a wholly new class of evils which they are powerless to remedy. Among these evils, those of endless registrations at every turn and corner, incessant and omniscient inspection, the imposition of uniformity in hours, construction of dwellings, fashions of life, and

rates of work, are among the most transparent. And yet, though the average good sense of the House of Commons, coupled with other favouring causes, has opposed a barrier to most of these devices, very little has been heard in opposition to them of arguments based on the essential rights of the subject to a certain measure of liberty. But unless the nature and the value of these rights are better apprehended and more loudly insisted on, it may become a mere matter of legislative accident how far any of these rights are retained in the future.

The Liberty of the Subject may be considered under two aspects, according as it is or is not connected with the administration of justice.

I. It is perhaps in connection with the administration of justice, and especially of criminal justice, that the liberty of the subject is at the present day most thought of and talked about. It is also in the administration of criminal justice, especially as presided over by the Court of Queen's Bench, that the value of the liberty of the subject is appreciated at the highest, and that liberty most efficiently protected. The main changes which have passed over the administration of criminal law of late years have related to:

1. The extension of the summary jurisdiction of Magistrates, and the creation of Police Magistrates, Stipendiary Magistrates, and Stipendiary Chairmen of Quarter Sessions, as substitutes to some extent for unpaid Justices of the Peace:

2. The establishment of new Criminal Courts, such as the Central Criminal Court, and the Court for Consideration of Crown Cases Reserved, for appeal on,

points of law raised in criminal trials; and the reduction to a certain kind of principle of the practice of re-opening before the Home Secretary cases which presumably seem to have some claim to the exercise of the Royal prerogative of mercy:

3. The settlement of criminal punishments on a scientific basis, as laid down by the best philanthropists and prison reformers of the past and present generation:

4. The re-construction, more or less complete at present, of the Criminal Common Law and Statutes:

5. The insistence on the responsibility of officers of justice to civil or criminal Courts.

1. It might have been expected that the ancient system of unpaid Justices of the Peace, nominated by the Lord Lieutenant out of the county gentry, would be found wholly inadequate to meet the wants of an age when the inordinate growth of some great towns, and especially the metropolis, was bringing with it an amount, variety, and complexity of criminal business, for the discharge of which the Justices appointed under that system could not be expected to have either leisure or capacity. At the same time the wants of a new age, and of a more refined civilisation, were generating a new class of emergencies, to provide for which a long and constantly growing list of offences has had to be constructed, not allied to crimes in the moral sense of the term, but made to resemble them in respect of the paramount importance of prohibiting their commission. These novel necessities have been grappled with by the Legislature in three distinct ways.

First, there was the expedient of providing for the appointment, through the Home Office, of professional Magistrates, sufficiently remunerated, and possessed of

a competent knowledge of law, and of suitable practical acquirements. Such persons have been especially appointed to preside over the police courts of the metropolis, as newly constituted at the commencement of the present reign; over the police courts of certain of the greater manufacturing towns of the country, as from time to time selected by Acts of Parliament, in concert with, or in dependence on, the local authorities; and over the courts of Quarter Sessions in certain populous places for which the newly adjusted criminal jurisdiction of a Recorder did not provide. The general question of the comparative value of paid professional justices and of the justices existing under the older English system has been much discussed of late years, though it is only in the case of the urgent needs of densely populated places that any systematic change has been attempted or effected. On the one hand, by the older system, which still prevails in the counties and the greater number of towns, a vast amount of unoccupied time and unapplied capacity is utilised for the benefit of the State, in a way highly economic to the public and harmonious with the sort of patronising, not to say parental, relations which some persons look upon as prevailing with great public advantage between the richer and the poorer sections of the country population. On the other hand, it is notorious that in certain districts it is extremely hard to find competent magistrates; and it is largely the custom to employ the local clergy in the discharge of functions which are ill suited to their spiritual character, which often enough confound their relations with their parishioners, when these relations are at once those of spiritual guide and helper on the one hand and of criminal judge

on the other, and which, by increasing the secular influence of the clergy,—already too preponderant, from the freehold tenure of their cures and the connection they thereby have with the land and its fortunes,—seriously complicate, in the eyes of Nonconformists, the problem of the conflicting rights of the Church and the State. It is also an evil which in no few cases becomes a scandalous one, that in the large class of quasi-criminal business which falls under the poaching laws, the unpaid magistracy as a class, and particular members of it individually, are judges in their own cause. In adjudicating on local poaching cases, it is impossible to avoid in practice a certain amount of reciprocity of treatment of accused persons in whose conviction individual landholders who are also magistrates are believed to have a personal concern. The constant social contact, the common interest at stake, and the general uniformity of habits of life and thought, all tend to form a combination between country magistrates in respect of the administration of the game-laws, which is as different as possible from anything that could take place between the Judges of the High Court of Justice on their occasional visits to circuit towns, or even between paid professional magistrates, the bulk of whose time is taken up in the administration of law, and in no other pursuit whatever. The criticism here applied to the particular case of the game-laws is equally applicable to all other instances—which are dangerously numerous—in which the corporate interests or social prepossessions of the landed gentry are cast in an inflexible mould and are adverse to those of any other classes in the community. Such instances are supplied occasionally in the course of the administration of laws

regulating the relations of employers and employed, of Education Statutes, of Poor-Law settlement laws, and of the Reformatory and Industrial Schools Acts. Short of the general appointment of paid professional magistrates,—a remedy still a long way off, and one too uncongenial to the national feelings to be thought of as a practical one for the present,—the only remedy for the sort of abuses which occasionally manifest themselves is found in the accidental notice taken by a local newspaper, followed by enquiry in the House of Commons if it be sitting, and an investigation by the Home Secretary, resulting, at the best, in a tardy compensation, or an adjustment in some way of the particular grievance. Public indignation is for the time allayed; and all the innumerable other cases of hardship, or excess, or glaring injustice are passed over in silence, till a like concourse of favourable accidents once again for a few days rouses the public attention.

The second and third expedients by which Parliament has of late endeavoured to adapt the machinery of criminal justice in its earliest stages to the wants of a new age are, that of largely multiplying the class of offences which are cognisable in the primary courts presided over by Justices of the Peace or Stipendiary Magistrates, and that of simplifying the procedure by which these offences are tried. These two expedients ought properly to be considered together, because the main apology for enlarging the summary jurisdiction of magistrates, increasing the powers of the police, and dispensing with the guarantee of jury trial, is to be found in the peculiar nature of the acts which are only classed as crimes for the purpose of turning to account the administrative machinery already in existence.

When it is considered that the Licensing Laws, the Education Laws, the Game Laws, the police regulations for traffic and locomotion in great cities, and an innumerable variety of special or general Acts for promoting the health of towns and of rural districts, are all worked through the same general machinery of police and magistracy as the detection of crimes in the common sense of the term, when it relates to theft or acts of personal violence, it is seen at once to what an extent the liberty of the subject is put in jeopardy by Parliament through a mere extension of the catalogue of offences triable in Courts of Law. For a vast number of the offences so created the machinery of justice is simplified to the utmost possible extent, for the purpose of securing promptness and certainty, in spite of the risk to the claims of abstract justice. Thus, under some Acts of Parliament, a single Justice of the Peace suffices instead of two; the verbal allegation of a policeman may stand in place of an oath for the purpose of obtaining a warrant; a warrant may be issued without a previous summons, or without satisfactory evidence that a previous summons has been properly served and neglected; appeals to the higher Court of Quarter Sessions may or may not be allowed, or may be allowed under very varying conditions; the penalties may or may not alternate between fine and imprisonment, or may include both. This extreme variety or plasticity in the procedure of the primary Courts of Justice is an almost inevitable consequence of using the same general administrative process for bringing to justice a person whose offence is that of driving at the wrong side of the street, and another person who is accused of engaging in a complicated fraud or in a murderous assault.

Nevertheless, it is to be remembered that there is great danger to the liberty of the subject in incautiously extending the range of offences in respect of which a policeman's word serves in lieu of his oath, and a magistrate's judgment stands in the place of the verdict of a jury. With respect to a vast number of the cases to which this summary jurisdiction is applied, it undoubtedly happens that little harm, even to individual persons, is done through the occasional mistakes or incapacity of magistrates and the police. But there are cases in which the question at issue so deeply concerns private character that the very accusation itself carries with it much of the effect of a condemnation. In these cases the most elementary principles of the liberty of the subject are set at nought, if special precautions are not taken to exact from the police more than the wonted securities for circumspection, deliberation, and attention to the principles of evidence. Such securities are afforded partly by receiving no information that is not on oath,—that is, given under the liability of incurring the penalties of perjury,—and partly by multiplying opportunities of testing at every point the grounds of suspicion by cross-examination. It unfortunately happens that in some sanitary matters, which in some of their aspects have a moral bearing, the principle of the legislation is best carried out by insuring the largest possible number of convictions, at any expense to individual rights. If it is an evil that a thief should be at large, it may be held to be far more disastrous to the community that a person with an infectious complaint, and who is reckless with respect to propagating it, should be at large. And yet the imputation of the complaint may conceivably be made with

far greater plausibility, and be rebutted with far greater difficulty, than the accusation of having committed so definite an act as stealing property which belongs to another. Thus, under a real concern for the public welfare, more or less enlightened by medical theories more or less sound, individual reputations may be heedlessly sacrificed, and, in the case of a miscarriage of justice, individual liberty grossly outraged. The worst of it, too, is that the operation of laws of this class is mostly confined to the poor and dependent portions of the community, who, by their very misery, or by the sordid habits generated in closely-packed dwellings and in circumstances of ignorance, overwork, and poverty, are most open to the invasion of the diseases or moral temptations against which the legislation purports to be directed. It would be a constitutional calamity if now for the first time the rights to immunity from arbitrary police interference, to a strict defence in a court of justice, and to all the humane provisions of the most humane system of criminal justice in the world, should be robbed from the more poor and afflicted sections of the community, and only reserved for those who are accused of signal and interesting crimes, or for individual persons in a more eminent station, for whose rights and privileges the community professes a peculiar solicitude.

2. The facilitation of criminal trials by the establishment of new Courts, whether of original or of appeal jurisdiction, is a further matter in which public liberty is largely interested, and in which much progress has been made of late years. The establishment of the Central Criminal Court, with its monthly sittings for the trial of the graver classes of crimes committed within a certain distance of the metropolis, coupled

with the operation of what is known as Palmer's Act, by which, in certain emergencies where it seems unlikely that a fair trial can be had in the country, the prisoner can be brought within the jurisdiction of the Central Criminal Court,—as well as the later provisions for multiplying winter assizes, and thereby guarding against the undue detention of prisoners committed for trial,—is a favourable specimen of the real constitutional anxiety which, though dormant in some directions, is keenly stirred into life on behalf of persons accused of well-recognised crimes. The institution of the Court for the Consideration of Crown Cases Reserved, by which the uniform and logical administration of the Criminal Law by Judges is guarded, and the more systematic practice pursued of late by the Home Secretary in considering cases brought before him on the ground that for some reason or other a conviction or sentence is not satisfactory, are steps in the same direction. Much discussion has indeed taken place of late as to whether the post-judicial enquiry sometimes conducted by the Home Secretary had not better be of a more public character, or whether a purely executive officer such as the Home Secretary, charged with a multitude of other business, is the fittest person to preside over such important and delicate investigations. It usually happens that the reconsideration of a conviction depends upon a series of accidents quite as much as upon the intrinsic unsatisfactoriness of the verdict of a jury. The Parliamentary and ministerial position and character of the Home Secretary has much to do with it, and the fortuitous alliance of the public press of the country with the convicted prisoner has more. Under any system of administering criminal justice in this country there

would always be a final opportunity for the exercise of the prerogative of mercy. The question is whether, previously to, or in anticipation of, the arbitrary exercise of this prerogative, it is expedient to interpose a public court of appeal from the verdict of a jury, to which either all convicted criminals should have a right of referring their cause, or only such criminals as might convince a public officer, say the Attorney-General, that, either through accidental circumstances at the trial, or through the appearance of fresh evidence since the trial, there was a presumption in favour of a fresh investigation of the whole or of some part of the case. Such a court of appeal might in some respects resemble that at present called into being by the Home Secretary for particular cases. It might be constituted of a special number of judges, assisted on occasions by professional experts, and might be relieved from some of the technicalities which in all ordinary cases hedge round in a wholesome way the rules of evidence. There is no need for the proceedings of the Court to be public at the time, though an accurate report of them should be preserved and published at an early date in a parliamentary paper. In this way the advantages of privacy for the purpose of escaping from the pressure of political zeal or popular passion would be attained, while the utmost opportunity for parliamentary and public scrutiny at the proper time would be secured.

3. The subject of criminal punishments has been on the whole treated of late in a spirit more conformable to the requirements of scientific thought in the different regions to which it is related than perhaps any other matter to which the Legislature has addressed itself. The thought of Bentham, brought to bear by the per-

tinacity of Romilly and the energetic invective of Brougham, has succeeded in transforming one of the most barbarous criminal codes of Europe into one which now competes with any, if not in respect of mildness, certainly in respect of scientific moderation. From the time that the punishment of death was confined to murder and treason, the main topics of general controversy have been those of the superior value of long or of short sentences, the proportions to each other which should be borne by the purely reformatory and penal elements in prison discipline, the use of remunerative labour in gaols, the value and kinds of penal servitude which can be resorted to in default of transportation, the modes and conditions of shortening terms of punishment, the expediency of systems of police supervision after release from gaol, and the limits within which, if at all, the punishment of flogging is permissible.

Most of these topics depend for their treatment on the logical application of principles of punishment which are now admitted with a tolerably wide amount of general assent. The question of flogging is the one which, more than any other, is closely connected with that of the liberty of the subject; and it is one for the proper handling of which the requisite principles seem hardly yet to have been discovered. Some confusion has resulted from the attempt to combine in one view the subject of corporal punishments as it presents itself in juvenile education, in the discipline of the army and navy, in prison discipline, and in the administration of the general criminal law. Though it is quite possible that the practice of flogging might be wholly inadmissible or wholly admissible in all these cases, still the principles of admission or non-admission are only in

some respects the same for all. It seems to be admitted by the Legislature that flogging is the least desirable of all criminal punishments; and it has hitherto been restricted to one or two classes of crimes, such as shooting at the Queen, or committing a robbery with violence after a certain fashion which for a short period obtained a dangerous popularity. For other crimes, such as that of wife-beating, confessedly as odious and brutal as any, and also very frequent, the Legislature has shrunk much from applying this punishment. It seems to be confessed on all hands that while flogging has the valuable element of being signally deterrent, a reformatory element is wholly absent from it. Worse even than this, the infliction of the punishment seems calculated to aggravate those very brutal and vindictive passions for the repression of which it is invoked, while the sort of retaliatory measures adopted by the State and addressed to the person of the offender are in themselves more likely to diffuse a spirit of disrespect for the body, and annihilate the prevalent sense of modesty,—which is the reverse of the effects which a well-chosen punishment ought to produce. On the other hand it is no doubt an evil to admit the principle and practice of flogging when applied to certain offences, and to reject its use in the case of other offences even still more morally abominable. Such an illogical application of punishments must lead to moral confusion in the mind of that part of the public which draws a large part of its moral sentiments from the instruction given by the rules and administration of the criminal law. It may be well for a short time to strike terror into the minds of a particular class of offenders, among whom a novel exhibition of criminality has suddenly

attained a vicious sort of fashion. In such a case as this, all considerations of personal reformation may be cast to the winds, if they compete in the slightest degree with the absolute necessity of vindicating the public order. Indeed, for this purpose the indirect consequences of a punishment generally inexpedient may for a time be neglected. But punishments which are inconsistent with personal reformation, and unfavourable to the general strengthening of moral habits—of which punishments flogging is undoubtedly one—should never be allowed to become a permanent institution of the criminal law.

It is not saying too much, to assert that these propositions, as thus enunciated, are a mere description of the liberty of the subject as an idea inherent in the English Constitution, and growing with the development of its growth.

4. The liberty of the subject in respect to the administration of the criminal law has been perhaps endangered as much from the curious doctrines which have prevailed in Courts of Justice relative to the definition of crimes as from any other cause whatever. This has been particularly manifested in the case of treason, murder, and the indefinite class of offences capable of being comprehended under the head of 'conspiracy.' Nor is it only the liberty of individual culprits or accused persons which has suffered from the indecision or the tortuous doctrines of Courts of Justice. The State has equally been a sufferer, as it must always be where convictions become matters of chance rather than of reasonable certainty, and where indiscriminate mercy is appealed to, to balance the scale over-weighted by a capricious severity.

The disorders, the political unrest, the lurking suspiciousness—if not overt doubt—as to the claims of the reigning family to the throne, as well as the want of good and free government throughout the country, had the effect, up to the commencement of the present century, of making the enactment and administration of the laws of treason one of the most conspicuous departments of Criminal Law activity. Usually, each successive Sovereign had his own Treason Statute for his special protection during his life; and the strained interpretation of the most obsolete passages of the most obsolete Statutes of Treason forms one of the bitterest passages in the history of the reign of so recent a monarch as George III. The general content of the population during the present and the previous reign, and the energetic effort which has been made on all sides to promote good and equal government for the benefit of all classes of the community,—as well as the more intelligent apprehension of the real nature of the English Constitution, and of the way in which it is a product and expression rather than an arbitrary creation,—have been manifested in no way more conspicuously than in the simplification of the law of treason even to the extent of creating a new offence which, in the interests both of accused persons and of the State, is free from most of the vices of definition adherent to the offence of treason under the older but still subsisting Statutes. The Statute creating the offence of 'Treason-Felony' (12 Vict. c. xii.),—under which a series of discontented persons who had committed murder, in pursuit, as they alleged, of political objects, were tried in 1868,—had not only the advantage of dispensing with all the difficulties of proof and disputable doctrines inherent in what were

known as the 'constructive treasons' of the older Statutes, but, by ranging ordinary offences committed by political enthusiasts no longer with political offences, but with the commonest crimes, went a long way to clear the popular conscience, as well as to facilitate the trial of offenders,—quite as much in their own interest as in that of the State.

Much discontent has been felt of late years with the definition of the crime of murder as recognised in the Courts of Law; and many efforts have been made by legal reformers, in and out of Parliament, to amend the definition. The effect of the existing definition, by which the essential element of malice need not be present in fact, but only by legal imputation,—by which, in other words, a person may be convicted of murder because of his peculiar situation in other respects, and not only because he actually desired to kill the person slain,—as for instance, because of his being engaged in committing another felony, resisting capture, or quarrelling and striking with a weapon likely to kill,—is to produce much vacillation in the administration of justice, and either to multiply convictions which are too discordant with the natural sentiments of justice prevalent in the community to have the slightest chance of being followed by adequate punishment, or to result in wholly irrational acquittals. Two remedies have been propounded,—the one, that of confining the punishment of death to cases where actual malicious intent is proved,—the other, that of distributing the crime of culpable homicide into two classes, of which only the graver class carries with it the punishment of death, and leaving it to the jury to find under what category the crime they hold to have been committed falls. This

last remedy, though having a certain plausibility and show of deference to popular institutions, would be in the highest degree inconvenient, inasmuch as the real question in any case before a jury would be whether on the whole they wished the prisoner to be hanged or not; and even the abolition of capital punishment would only alter the force of this objection, and not its character. A popularly constituted body, from its very excellence for deciding bare matters of fact, is the least suitable of all bodies or persons to assign punishments. The assignment of punishments, when they are not fixed in advance by the law, tries to the utmost the skill of the Judge, who is bound to consider a vast number of topics, such as the prevalence of a particular class of crimes at the time, the character and temptations of the prisoner, the probability of a repetition of the crime either on the part of the prisoner or of some other person, and the danger to the community of a recurrence of the crime,—a class of complicated and sometimes competing considerations with which only a highly-trained mind can deal, and which could never be handled with advantage by a promiscuous and numerous group of persons, accidentally congregated together.

The law of conspiracy has recently undergone some amendment, with the view of preventing its being abused in the interests of employers of labour for the solution of purely trade disputes. Nevertheless, though this is the most indefinite part of the old criminal law, and the decisions upon it exhibit every kind of variety and indecisiveness,—the liberty of the subject being proportionately imperilled,—it is not clear that an amount of definiteness can really here be attained which would be in a logical sense satisfactory. For two or more

persons to agree to do an act injurious to another or to the State,—even if the act contemplated would not itself, where committed by a single person, be a crime, —may undoubtedly mark a stage in the accomplishment of a generally mischievous purpose, which it may be of great public importance to arrest at that point. But it is obvious that the proof of such an agreement is always difficult, and none the less difficult where the facts are most reprehensible; and if the objects agreed about be not restricted to those forbidden by the criminal law, almost any latitude of interpretation is permitted to the judge, to the jury, or to both. On the whole, the claims of the liberty of the subject seem to call for a very strict definition of the objects which are possible grounds for an indictment for conspiracy, though these grounds need not be limited to offences already cognisable under the criminal law.

5. The principle has been over and over again substantiated of late years, both by the Legislature and by Courts of Justice, that all judicial officers, as well as all members of the Executive purporting to act in a judicial character, are criminally as well as civilly liable for malicious invasions of the liberty of the subject. It has been the practice of late years, in all Statutes which prescribe in detail the procedure under which they have to be administered, to prevent this principle of civil and criminal responsibility from being abused so as to impair the facility of the general operation of the Act. This is effected by requiring a lengthened notice to be given to the officer whose conduct is impugned of the proceedings to be taken against him, which must be taken within a limited time; by facilitating his defence, through enabling him to give any matter of exculpation

he pleases, at the time of the trial, under the general plea of 'not guilty'; and, in some cases, by relieving him from the payment of any costs, even where unsuccessful in the action, unless the Judge before whom the trial is had certifies his approbation of the action and of the verdict. Justices of the Peace are specially protected by a series of provisions which were recently codified in the three Statutes known as Jervis' Acts. (11 and 12 Vict. cc. xlii., xliii., and xliv.) It was under one of these Statutes that it was decided in the Court of Queen's Bench, in what is now well known as Governor Eyre's case, that, in the case of a charge of misdemeanour alleged to have been committed by the ex-Governor of a Colony, a magistrate within whose jurisdiction the accused had come had jurisdiction to hear the case; and if he committed on the charge, it was his duty to return the depositions into the Court of Queen's Bench, where alone the charge could be tried. It was also decided, on a civil action being brought in the Court of Queen's Bench against Governor Eyre, that a Colonial Act of Indemnity, by which the right of action in respect of an act done by the Governor of the Colony is taken away before an action has been brought in this country, is a good defence to such action in this country.[1]

Besides such topics as are included under the five preceding heads, and which may be regarded as normal matters of interest in reviewing the condition of the liberty of the subject during any period of history, there have of late years sprung up certain special controversies, to which accidental circumstances connected

[1] Reg. *v.* Eyre, L.R. 3 Q.B. 487. Phillips *v.* Eyre, L.R. 4 Q.B. 225.

with the rapid strides of civilisation in some of its aspects have imparted peculiar importance.

One of these topics, which as yet has only been cursorily alluded to, is that of the Police. It was seen in an earlier part of this treatise that the first institution of the Metropolitan Police by Sir Robert Peel in 1844, as a substitute for the older and then wholly ineffectual system of parochial constabulary, marked an important stage in the advance of that more centralised method of government which the modern conditions of society were rendering imperative. The reform of the municipal corporations, ten years before, supplied a ready machinery for the extension of the practice of imparting to the police force an official character and distinct organisation under a competent authority, which has gone far to supersede altogether the use of the watchman and the parish constable. The extension of the same sort of institution to counties, and the progressive enlargement of the area covered by the metropolitan police, together with the increase of their powers, are all harmonious steps in the same direction of making the police force of the country a substantial constitutional element of constantly increasing importance in reference to the liberty of the subject. In foreign countries, indeed, and especially in France, even under the most various forms of government, the police have been so highly organised, and invested with so great an amount of independence, both of legislative and of central executive control, that it is well known that they have constituted a physical and moral force of so portentous a description that neither political parties nor even influential private persons, and still less the dependent classes of society, have been able to

move with any freedom in directions against which the police have determined, for reasons of their own, to oppose a barrier. It would not be in place here to investigate the causes of a state of things which is as much lamented by the more intelligent statesmen on the Continent as it is matter of just reproach on the part of States possessing better securities for public liberty. These causes, in France at least, under the Republic, are being brought to the surface; and inasmuch as the undue preponderance of the authority of the police is found to have been connected with some of the greatest scandals and difficulties which the Government in that country has had to encounter, there is some hope that the country will be delivered from a thraldom which is worse than any other because it subsists mostly in the dark, and by its very nature defies the remedies of judicial investigations, parliamentary debates, and outspoken public opinion, which modify, and tend in time to correct, all other abuses.

Nevertheless, the fact of this vicious fungus growth of police officialism in other countries suffices to point out for the benefit of such countries as England and her colonies, and the United States, which possess the securities of the Habeas Corpus procedure and are habitually jealous of police aggression, some of the inherent dangers to public liberty which cling to a highly organised system of police administration. There are already too many instances presented in Courts of Justice in this country of these dangers having made their appearance.

It is to be remembered that the direct tendency of a growth of population, and of attendant civilisation, is first to multiply Statutes, and then to multiply police who shall carry them into effect. In England the police

at the present time in the metropolis and most great towns are charged, over and above their habitual functions of detecting crime and capturing criminals, with an inordinate mass of business which is simply cast upon them because there is no other class of persons to do the work, and because their relations to the police courts and the magistrates who preside in them render it convenient to use one and the same machinery for carrying out all the rules, bye-laws, regulations, and minute provisions which the bulky load of Statutes affecting the local administration of such a city as London require to be carried into effect. Thus, not only the Poor Law, with all its complicated and innumerable provisions, but the Licensing Laws, the Vaccination Laws, the Public Health Laws, the Education Laws, the laws relating to the taxation and control of horses, dogs, and vehicles of every description, have all to be administered by one and the same body of police, in addition to the arduous and responsible functions which they have to perform in helping to administer the ordinary criminal law. One result must be, the multiplication of the police force to the point needed by the increase of business; this multiplication must imply, at any rate for a time, the descent to a lower class of the population to supply the men for the service, and the dispensing with the more strict conditions and qualifications which a smaller demand for men would have admitted of. Other results are, an increase of difficulty in superintendence; a progressively ascending scale of delegated authorities, diffusing the responsibility, while the very number of the persons employed prevents individual officers from acquiring a character and reputation of their own; and an *esprit de corps*, quite as often adverse as favourable

to the public interests, taking the place of original energy and the sort of proud and honourable independence which is easily dissipated when mankind is compelled to move in closely compacted masses. The dangers here indicated cannot be avoided by any other legislative precautions than such as are implied in imposing the most efficient forms of inspection, and according the best attainable securities in the way of civil and criminal remedies against delinquent officials. Nevertheless, to point out these dangers is of itself to help to remove them. When once it is clearly understood that, in spite of their training and discipline, their generally superior education, and their average good personal character, they are notwithstanding a class dangerous to public liberty, then to be fore-warned is to be fore-armed. The position of an ordinary policeman—and still more that of a skilled detective—in a police court, may be contrasted with that of a poor half-articulate wretch who cannot tell his or her own story simply because the law is unknown, the accusation is not understood, the facts relevant to the enquiry are not apprehended, and language has never hitherto been used except in the most vernacular shape for a few constantly recurring needs in a very familiar society. The magistrate understands the policeman, and has understood him in countless similar cases, when he has used much the same words, and with much the same assurance of their truth. It is an obvious consequence that a sort of understanding should grow up between the magistrate and the police, the general result of which is that, oath for oath, the police are always believed, and the accused never. It has already been pointed out that, even where an energetic defence is presented and

is successful, the accusation itself may, for all the most precious purposes of life and character, be equivalent to conviction and sentence. These facts are generally best known to the best and most highly-trained judges, and it is a familiar assertion, founded, no doubt, on truth, that a policeman has a much worse chance of having his unsupported testimony believed by a Judge of Assize than by a Chairman of Quarter Sessions, or, still more, by a Justice of the Peace at Petty Sessions. When once the facility, the articulate expression, the absence of hesitation, and the plausible self-respectful assurance of the police in giving their evidence are fully discounted, the dangers of that evidence going for more than it is intrinsically worth are largely reduced, if not annulled.

Another topic which has recently acquired prominence has been that of the intrinsic value of trial by jury, and, more particularly, of trial by jury as it now exists in England, where a jury of twelve must be unanimous. The case in favour of retaining, or rather, of imposing, jury trial in civil matters has been abandoned, since the institution of the County Courts has introduced the practice of only allowing a jury of six when one of the parties requires it; and the Supreme Court of Judicature Act, following the analogy already supplied by the Probate and Divorce Court, has given the greatest facilities for allowing questions of fact as well as of law to be tried by the Judge without a jury if the parties consent. The argument in favour of retaining trial by jury in criminal cases, at any rate for the heavier species of crimes, rests rather upon necessities which might occur in a conceivable condition of society, than upon any belief in the superior value of the verdict of a jury over the decision on the same

facts given by a Judge. Though Judges are not dependent directly on the Executive authority, still there are now, and may be still more hereafter, cases of a partly social or political character, on which the decision of a professional Judge, originally appointed by the Crown, and in constant correspondence with the Home Secretary, as well as in assiduous social intercourse with the more elevated classes of society, would never be removed from a suspicion of partiality. Such cases are those of treason, treason-felony, conspiracy, malicious or blasphemous libels, and all offences in which some important class of society is interested, adversely to some other class or classes. As it is, the opportunity afforded to the Judge of summing up is usually employed, rightly or wrongly, as a medium by which the Judge intimates what he thinks the verdict ought to be. Thus the jury has all the opportunity of the best professional assistance in evaluating the evidence, without being absolutely bound by the conclusion as intimated to them.

Of course, this presupposes that the jury, as now chosen in England, and as required to be unanimous, is in itself a sufficiently satisfactory tribunal as a substitute for the Judge. The requirement of unanimity is pretty well confessed on all hands to be irrational, if not illogical. It is the traditional inheritance of a time when the public interest was sharply opposed, or believed to be opposed, to the interest of the Crown, the Crown requiring convictions, and the public interest acquittals. Thus the requirement of unanimity in the jury marked the highest point of the victory over the Crown, or, rather, marked a point in the natural development of the jury from which the Crown has never suc-

ceeded in forcing it back. No conviction could be obtained unless every member of a jury was in favour of conviction; but an acquittal, for the moment at least, could be obtained if a single member of the jury persisted in being in favour of it. In the present day, when this class of constitutional jealousies has long vanished, the requirement of unanimity is a mere fossil and pernicious anachronism. It may be well that, in favour of life and liberty, the majority necessary for conviction should be large, perhaps overwhelming; but common sense demands that there should always be an opening for prejudice, partiality, excessive ignorance, or even corruption, to have its play without bringing public justice to a stand-still. To enlarge the jury, in all cases only triable at the Assizes or at Quarter Sessions, to such a number as would make twelve a majority of two-thirds, and to require the agreement of twelve jurymen at least for a conviction, would carry out all that is needed in the way of reform in a spirit literally conformable to the traditions and practice of the Constitution.

Another topic which has of late years been constantly engaging the attention of Criminal Law reformers, and in the proper treatment of which the liberty of the subject is seriously involved, is that of the oral examination of a prisoner under trial for a criminal offence. From causes, some of which have been adverted to above, connected with the development of popular liberty in this country, a prisoner under trial has been habitually treated with a tenderness and considerate indulgence which has, even in his own interests, somewhat overreached the mark. It was a popular doctrine in the last century,—at a time when every sort of impediment was thrown in the way of a prisoner

being defended by counsel, or otherwise having an equal chance with those who represented the prosecutor and the Crown in the sort of hazardous game which the form of the proceedings in a way dramatised,—that the Judge was counsel for the prisoner, and that he needed no other help but the presumption of innocence in his favour, and the acuteness of the Judge to detect errors in the conduct of the prosecution. In the present day, however, when the public ends in the administration of criminal justice are better understood and more calmly appreciated, the object of getting at the truth is beginning to rank at least as highly as that of affording a certain number of chances of escape to a person who has found his way into the prisoner's dock. The fact is, that after a committal by a magistrate on a careful consideration of the evidence which affords grounds for suspicion, and after a true bill has been found by the Grand Jury, or after committal on a coroner's warrant, the logical presumption of guilt is against the prisoner. It is true that all the circumstances have to be examined afresh at the trial; and for the purposes of this examination, and in order to ensure its thoroughness, a formal presumption of innocence is always raised. But this last-mentioned presumption cannot do more than enforce the necessity on the part of the prosecution of an affirmative proof of guilt being made out. There must be all along in the minds both of Judge and of jury another presumption, over which mere legal rules can have no hold, that a serious case has already been made out against the prisoner, and that the real purpose of the trial is, to determine whether he can meet it. Thus, whatever may be the formal legal proceedings, the real question at issue is, what explanation the prisoner can

give of the facts which appear against him. It is thus a startling anomaly to find that, for the purpose of making a statement or explanation during the crisis of the trial, the prisoner's mouth is closed. Where the prisoner is undefended by counsel, and conducts his own case, he usually contrives, whether he is expert or whether he merely follows a natural instinct, to interpolate in his defence a variety of exculpatory statements of fact. Such statements are, of course, not made on oath, nor subject to cross-examination; and though they are often checked and interrupted by the Judge on the ground of their glaring irregularity, they are also frequently allowed, or even encouraged, by some of the best criminal Judges, from a mere sense of humanity and desire to get at the truth. The only other way in which a prisoner's own explanation of the case can come before the Court is by reading the depositions made by him in the course of a previous magisterial investigation. The objection that is usually alleged to granting facilities for oral statements made by prisoners is, that a statement made by a witness, whether continuous or in reply to a friendly examination, is good for nothing,—or worse than good for nothing, as being misleading,—unless subjected to another process, that of cross-examination, which has for its purpose the clearing up of what is ambiguous and the further investigation of the grounds on which the statement is made. It is said that this process of cross-examination is essentially of an adversative and somewhat hostile kind, and that it would imply a breach in the familiar attitude of the law to an accused person, if he could be put in a position in which either a prosecuting counsel, or even the Judge, would be entitled and compelled to expose him

to the possible tortures of a set of rallying and inquisitorial questions. The precedents of continental methods of procedure are most unpopular in this country; and even confessions are looked upon with much suspicion and dislike, although every precaution may have been taken to ensure voluntariness and to remove every element of pressure. Nevertheless, there is a multitude of cases in which great light could be thrown on dark places by simply allowing the prisoner to make any statement he pleases, perhaps with the assistance of the Judge to draw his attention to what are the material and relevant facts on which information possibly in his possession is demanded. In Criminal Courts it will always happen, from the nature of the case, that the person mainly implicated belongs to the least educated classes of society, and therefore no parallel applicable to their case can be drawn from the success or ill-success of the changes which have recently taken place in the direction of admitting in other Courts the evidence of parties to suits. The danger is, that where persons are very ignorant, very dependent, and proportionately fearful of that unknown and mysterious world of law and order which encircles them, and yet from which in their daily lives they are often so far removed, so soon as they are forcibly brought within so unfamiliar a region, their utterances may be only the dictation of their hopes, their fears, or their wildest imagination, and either have no relation to fact, or have that perilous sort of relation to it which is sufficient to confound and mislead the enquirer, rather than of use to advance his researches. On the whole, the advantage here, as elsewhere, is in favour of not excluding possible evidence; but perhaps more here than anywhere else is

it incumbent on the Judge to guide the investigation, and draw the attention of the jury to the inherent intricacies and defects of the process of search resorted to.

With respect to the administration of justice in civil cases, the chief changes of late years affecting the liberty of the subject have been those connected with the abolition of imprisonment for an indefinitely extended period while a debt remains unpaid, coupled with the introduction of the system of County Courts giving a ready and effective remedy for the non-payment of small debts, and the reform of the bankruptcy and insolvency laws, for the punishment of fraudulent indebtedness on the one hand, and, on the other, for placing a merely unfortunate trader or debtor on a large scale in a position for retrieving his fortunes, and for ultimately paying his creditors in full, if disposed to do so. These changes are not only favourable to public liberty, which under the old system was often grossly violated through the preferment of preposterous claims, or the vindictiveness of disappointed creditors, but are highly conducive to wholesome trade relations, and to the placing of credit on the higher basis of moral confidence rather than the sandy foundation of mere legal terrors. In fact, the whole reconstitution of the Courts of Law and Equity which has recently been proceeded with, and the simplification of means by which rights can be vindicated, and wrongs remedied, has a directly favourable bearing on the protection of the liberty of the subject. Where law is capriciously or expensively administered, the rich always has an advantage in litigation,—and therefore in all business which might terminate in litigation,—over the poor. In such a state of things, the poor is bound—or

led, whether consciously or not—to control his actions largely at the bidding of one who is prepared, on meeting the slightest resistance, to play the game of a legal proceeding, and incur any amount of expenditure in forcing on a matter in dispute from one court of appeal to another till he obtains a decree in his favour. Thus, the law so administered, in spite of its orderly forms and its plausible respect for the equal rights of all men, becomes as intolerable an engine of tyranny as the most despotic government or tyrant. The cheaper law is, the more certain it is, and the nearer it is to the homes and the work of all citizens, the better it conduces to defend the rights of those who have no other avenger, and to protect the liberty of those who, in a densely crowded population, without friends, without money, with spare education, and amidst absorbing toils, have just so much free space to live and breathe in, with the self-respect worthy of a man, as the law gives them, and no more.

II. It was said above that in a growing class of cases not connected with the administration of justice a tendency has recently manifested itself to encroach, in the name of the public interests, on the liberty of the subject. Illustrations of this tendency are supplied by the case of the Vaccination Laws, the laws for enforcing compulsory education, the Factory Acts, the Lunacy Laws, the Public Health Acts, and some of the practices and laws appertaining to the discipline of the Army and Navy.

The invasion of the liberty of the subject which is contemplated by each of the departments of legislation here enumerated is justified on its own special grounds, —so far as it is, or can be, justified at all. The broad

principle is now pretty generally confessed that it is as much an abuse of liberty for a parent to refuse to have his child educated as it is for him to refuse his child the necessaries of life. It is also admitted that to diffuse an infectious complaint, through a neglect of essential precautions which are in everybody's hands, is an abuse of liberty which the State is entitled and properly required to guard its subjects against. So far, there is now little discrepancy with regard to principles. The practical difficulties arise when it is attempted to give effect in detail to these general principles, keeping in view the rival scientific theories which are advocated in different quarters before the Legislature, and the diverse habits of the people, under a great variety of circumstances, for whom it is purported to provide by one comprehensive legislative measure. Assuming, for instance, that general vaccination is a valuable if not wholly trustworthy preservative against the general spread of the small-pox, and that the small-pox is so obnoxious a disease that a considerable diminution of public liberty may properly be encountered in order to resist its progress, still it may happen that, since the vast mass of the population on whom the burden of the compulsory clauses falls feel the burden, but do not feel with equal keenness and force the necessity for it, a spirit of resistance, not to say rebellion, may be generated, which, if prolonged and intensified, may be an evil which goes far to balance the somewhat problematical physical advantages of a peremptory and wholesale execution of the law. The difficulty of applying any comprehensive legislation of this sort, (and most sanitary legislation is by its nature of the most comprehensive kind,) is, that either one hard and fast stereotyped

practice and mode of administration has to be applied to an indefinite number of variable cases and circumstances, or else the administration of the law, in itself forbidding and unpopular, has to be largely delegated to local authorities and agents of inferior capacity, subjected to a very complicated, and at the best most imperfect, process of inspection. This difficulty has been largely felt in applying the compulsory clauses of the Education Statutes; and it has been hitherto met, as in the Local Health Acts, by rendering the adoption of compulsion to a great extent a matter of voluntary choice in every district. The Vaccination Laws, and those clauses of the Factory and Workshop Acts which restrict the labour of women and young persons not of tender age, are couched in terms which leave no possibility for the admission of pliant and flexible variations in the execution of the law. The Lunacy Commission, as now existing, which superintends and controls in detail the operation of the Lunacy Acts, is charged with the duty of watching with the utmost possible minuteness the operation of the Acts. Nevertheless, even here, the operation of the Acts, as affording an insufficient protection to the liberty of the sane, so often as an imputation of insanity is beneficial to the interests of influential relatives or neighbours, has latterly been brought into most serious controversy. Probably, however, the remedy is here near at hand, and the interposition at all points of a Justice of the Peace and a quasi-judicial proceeding would obviate many of the difficulties at present experienced.

Over and above all difficulties of procedure, and the apprehension of an undue extension of police interference or magisterial despotism, there is a question which has

previously to be settled, though the discussion of it is frequently implicated in the discussion of those other matters. Supposing the region of police and magisterial activity were restricted to the smallest possible dimensions, and placed under the most satisfactory judicial or executive control, it still has to be ascertained whether, for any public purposes whatsoever, the person of a citizen can, with due regard to recognised constitutional principles, be exposed to certain kinds of forcible aggression or violation. In some respects, a line has been in practice drawn, which, in the matter at least of criminal punishments, excludes certain modes of corporal aggression as possible modes of punishment. To this class belong all kinds of mutilation, whether temporary or permanent, and all that is rather vaguely designated by the name of 'torture.' When the question of flogging comes under discussion, it is always held to be a sufficient condemnation of it to establish that it belongs, especially if severe and repeated, to the class of 'torture;' and the same conclusive objection has been made to the use of what is known in prison discipline as the 'silent system,' and certain other kinds of punishment which are only proved after long experience to be far more painful and destructive than at first sight they seem. Such punishments are those of working, as at the treadmill, for a great length of time, at a wholly unproductive sort of labour, or being placed in positions of shame and public ignominy, as for instance by wearing a strait waistcoat, or being placed in the stocks or the pillory. But, apart from the consideration of criminal punishments, to which a far greater amount of scientific and humane thought has been attracted than elsewhere, the propriety of using flogging as a recognised punishment,

even for the purposes of army and navy discipline, has latterly been brought into serious controversy; while, in the departments of sanitary legislation, the limits to the right of forcible personal aggression, if any such limits exist, have as yet hardly been marked at all. A very considerable strain of the rights of the public as opposed to the rights of individual citizens has been introduced by the compulsory Vaccination Laws; and the general principle of the Lunacy Laws is already being quietly, though perhaps it can hardly be said surreptitiously, extended to a new class of persons altogether, known as habitual drunkards. In these two last cases, a certain amount of assent on the part of the person directly affected is obtained or reasonably presumed, the lunatic who is at large being liable to do at least as much injury to himself as to others, and the habitual drunkard being supposed and required himself to seek at the hands of the State, with all the surrounding precautions of magisterial vigilance, the protection which he has lost the power of affording to himself. But there are cases in which enthusiastic medical science, or the affectation of medical science, is not content to confine its aggressiveness to the case of an advantage to be obtained for the whole population, (as in applying a comprehensive system of vaccination,) or of an advantage to be conferred on narrow classes of persons who may properly be assumed to be eagerly solicitous for it. In the case of laws which involve a violent trespass on the person of a kind notoriously resented by the bulk of the community, if any justification is to be found, it must be sought in some wide-spread advantage to be obtained by large classes of the community, who, while innocent themselves and unable to

find protection from the natural family protectors who are directly responsible for them, have no recourse for safety but in the oppression of their fellow-citizens, or of some narrow classes of them. The mere statement of this solitary opening for what some might think a justification exposes the nullity of it. It is only perhaps a few here and there who are the direct sufferers in each generation, but the aggregate suffering of injustice must not be calculated, for constitutional purposes, by ranging on one side a numerical estimate of those who are injured and on the other an equally precise enumeration of those who are believed to be profited. Each solitary aggression radiates in the way of diffusing alarm and apprehension through all classes of society; and if once the bulwarks of personal liberty in respect of honour and self-respect are believed to be vacillating, no securities of any value exist at all, except such as are presented from moment to moment in the casual abstinence from the exploration of new fields by the experimental science of the day.

CHAPTER V

CONCLUSION.

THE period of fifty years which has been passed in review in the previous chapters might appear to be arbitrarily chosen, if the remarks with which this treatise opened were not borne in mind throughout. It is not that any one period is more significant or momentous than any other period; and still less that the times in which a writer is living are really better known to him than previous times; but that, in order to show what the Constitution is, it is necessary to exhibit it as living and progressing, and not as stagnating. It is customary, indeed, to present the Constitution only on its legal side; but, though for purposes of controversy in Courts of Justice the legal side is the only side, yet for purposes of political evaluation, comparison, or prediction, it is the least important or true side. The Constitution of a country, and pre-eminently the Constitution of England, is the product of innumerable forces and facts which are emphatically mobile, and is consequently undergoing incessant flux and change. To know the Constitution is to appreciate the character and the rate of change; and this can only be done by extending the survey over a period long enough to present what may be called the dynamical quality of the Constitution, and not merely to concen-

trate the gaze on a momentary situation, which, at the best, can only disclose component statical elements.

Nevertheless, the method here pursued demands much of the reader. During a period exceeding that of a generation, events of lasting Constitutional import lose a great part of that lively political interest which becomes transferred from year to year to the topics, problems, and struggles of the day. On the other hand, these topics of the day are so familiarly discussed in every form of periodical, whether appearing daily, weekly, monthly or quarterly, that the public curiosity is more than sated, and, even for the purpose of the gravest philosophical research, and of a treatment in due proportion to the parallel events of other times, the attention even of the professed student can hardly be roused, or if roused, can only be momentarily retained. Nevertheless, it is true that the partial handling of grave constitutional problems which is necessarily incident to their isolated discussion at the moment of accidental political interest, and at no other moment, is one cause of the want of preparation of the public mind for meeting unforeseen constitutional emergencies, and for resisting the sophisms of popular political charlatans. It is thus that in Constitutional history, and not least in recent Constitutional history, the only explanation can be found of Constitutional Law, and of the facts of the Constitution itself.

If it were possible to characterise briefly the period over which the previous review has extended, it might be said that the changes which have taken place are mainly exhibited in three distinct directions:

i. That of the division of labour, in respect of popular government, between the people and the House of Commons;

ii. That of what may be called novel mechanical contrivances for simplifying, concentrating, and extending the area of Government;

iii. That of novel relations between the Executive Government and the Houses of Parliament.

i. There is no doubt that a number of social and political circumstances, to which it is needless particularly to allude, have combined to impart to the general public habits of keen attention to politics, and even of acute political discrimination in matters involving a very comprehensive survey of the whole political field,—foreign and colonial as well as domestic,—which is wholly unprecedented in former times. Side by side with this new development, the operation of the Reform Bill of 1832 has been on the whole, as is generally admitted, to introduce into the House of Commons a larger number of members whose sole qualification is their wealth, and to exclude the small class of persons who under the older system were, in spite of all its gross shortcomings in other respects, frequently admitted on the sole ground of their purely political qualifications. The removal of the Paper Duty, and the extraordinary growth and improvement of the newspaper press, as well as the lately invented facilities for locomotion and rapid communication of news, have all conspired to render the public nerves susceptible in the highest degree to the slightest indication of any unexpected political movement in the Houses of Parliament or in the counsels of the Executive Government. The result is, that the aggregate popular force, will, and intelligence, outside the Houses of Parliament, has become,

as it were, incorporated into a potent political organ, which not only competes with the recognised Legislature, but threatens at times,—even when there is no immediate prospect of an appeal to the Constituencies,—to overpower and drown its voice. The more normal operation of this popular factor is to give increased weight to the mere fact of debate and discussion in the Houses of Parliament, as compared with the weight due to a preponderance of voting power. It has been noticed of late that, though a debate in either House of Parliament seldom alters a vote,—the vote of every member having been accurately discounted beforehand,—yet the discussion, when happily raised on a true issue, and kept free from intruding personalities or accidental distractions, has such an effect on the public mind that a policy formally approved by the vote of a large majority is often condemned to practical nullity. This nullity is sometimes expressed by a counter vote in the other House of Parliament; and in this way the bifurcation of the Legislature into two Houses rather has the effect of fortifying the popular will than of checking an inconsiderate acquiescence in the claims of an uninformed popular enthusiasm. In a recent paper on Modern Parliaments,[1] Professor Pearson, of Melbourne, has drawn attention to other consequences of the same general tendency. He has shown that not only,—as above indicated,—is the aggregate popular force outside Parliament being increased at the expense of the Legislature properly so called, but that in democratically constituted communities, to the type of which all progressive communities must approach, some of the most influential

[1] *Fortnightly Review*, July 1879.

politicians, and the most skilled specialists in different departments of political science, must, by the nature of the case, be outside the walls of Parliament, and yet none the less exercise the strongest direct influence on its counsels and resolutions. The conclusion from these remarks is one which has been already anticipated in the practice of the United States of America. Dr. Joseph P. Thompson, of Berlin,[1] says, 'I have alluded 'to the provision for popular education made by the 'State Governments, in part by general funds, in part 'by yearly taxes levied upon school districts. This the 'State does of right and of necessity, since the safety 'of political society in a free State hinges upon the 'intelligence and virtue of its citizens. As a rule, 'knowledge favours virtue and order.' As Rousseau said, '"To open the schools is to shut the prisons;" hence 'the State must require and provide that every citizen 'shall have knowledge of his duties as a member of 'civil society.' The lesson in fact is, that the defence of the Constitution must be increasingly sought in the spirit and the informed intelligence of the people; and that no vaunted legal securities or historical facts in the past will be of the slightest service to keep at a distance either despotism or anarchy, if the people as a whole are not awake to the value of what they have, and morally determined, on behalf of themselves and their posterity, to preserve it.

ii. A large portion of the history passed in review in the preceding pages has been concerned with what may be called the artificial mechanism of government. To this head belongs all the manipulation of work con-

[1] *Lectures on the Centennial of American Independence*, Boston, 1877.

ducted by Parliamentary committees; the peculiar arrangements for reconciling local government with central control,—especially as affecting the municipalities of the country; the government of dependencies; and the supervision of large State departments, such as those of the Civil Service, the Post Office, the Revenue, the Police, and the Army and Navy. It has been seen that, whereas deep constitutional principles are really involved in each one of the appropriate arrangements which have been resorted to, yet, besides the issues which are political or ethical in their character, the mere practical contrivances which have been necessitated have called for no small amount of organising skill. There is indeed a danger, such as has been experienced in France, and to some extent in Germany, that the very elaborateness of the mechanism may become itself an avenue for encroachment on the principles of the Constitution. Every great public department,—by its special knowledge, by the mutual and reciprocal confidence which pervades its members, by tried habits of co-operation and even mutual courtesy, —becomes a centre of force and influence which may rival all the more desultory forces of public opinion, and even the casually recollected maxims of public policy and morality, which may be ranged against it by way of check, if not of resistance. Even municipalities and charitable institutions have innate powers of action in a way counter to the public interest as largely understood, which no central control can effectually keep pace with. It is sufficient here to point out the general character of these dangers. The last fifty years have been rather occupied with inventing the complicated mechanism which has been called for,

than with providing against its contingent dangers. It may be that the next generation will be concerned with discovering in the essential principles of the English Constitution the appropriate checks and remedies against either an imperious officialism or an unscrupulous and selfish abuse of local trusts.

iii. It is scarcely worth while saying more than has been already intimated of the advance which recent times have witnessed in the strengthening and organisation of the Executive Government. Some of the dangers concealed in this development have made themselves specially apparent of very late years; and it has therefore been thought worth while to give in almost redundant detail an account of the movements of Lord Beaconsfield's Government which have recently excited the solicitude of those who have most admired and best understood the established principles of the English Constitution. The doctrine has been almost openly advocated that the Ministry of the day, with a large Parliamentary majority, are, for all purposes for which they can succeed in obtaining the *ex post facto* ratification of their supporters, omnipotent. The doctrine of the 'omnipotence of Parliament' has always been held to imply constitutional suicide; and surely a like implication is conveyed by the notion of the omnipotence of the Cabinet. It would rather seem that the very purpose of a Constitution was to impose limits and barriers to the accidental excesses both of Parliaments and Governments.

The study of a modern Constitution according to the historical method here pursued suffers in interest

from a want of the element of antiquity, which lends much of its charm to what is usually known as historical research, and of the dramatic element, which rouses zeal and curiosity in the observer of the incidents of mere political change. Constitutional life is longer than political life, but shorter than historical life. There are many readers who can stand the strain of a lengthened antiquarian investigation, and there are many who can eagerly devour the recent anecdotes of political vicissitude. But it is only a limited class of students who can find mental sustenance and moral stimulus in tracking out the slow, patient, oscillating story of constitutional change. The story is perhaps rather less than more attractive when it is the story of modern life, and therefore implicated in the often repulsive annals of party discord, and in the biographies of persons only too familiarly known in their private capacities. Nevertheless, this detailed and modern history of the Government in relation to the people and the people in relation to the Government, when deeply studied and accurately scrutinised, presents the truest of all aspects of the national life and character. It is not in the individual life, or even in the family or social life, that the last and most precious products of character are elicited or can be exhibited. Nor, again, is it either in the mere sufferance of political wrong, or the noble reaction against such wrong, that the whole temperament and real proclivities of a people can be manifested. The people can be best studied in their attitude towards what may be called the chronic and necessary conditions of national existence. These conditions,—which are, in fact, the essential or juridical elements of the Constitution,—are not in themselves

of a kind to attract attention by their singularity, their majesty, or their scenic portentousness. They are, indeed, often commonplace in their nature; and, as civilisation improves, they tend to identity in all nations. But the conduct of the people in view of constitutional requirements, or anticipated constitutional change, may present the utmost diversity from country to country, and from age to age. It is here that supreme and unselfish conscientiousness, in the absence of all mere excitement, is truly tested. It is here that the value placed by a people on liberty, and on the opportunity of a free moral life for all, is put to the proof. It is here, and here alone, that a people can show whether they know what is the worth of that which they have inherited, what are its shortcomings, what is the cost of handing on to their successors the good things they have, and whether they are willing to endure the silent but stern sacrifices which may be required to defray it.

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